

AMENDED TRANSMITTAL FORM

TO: U.S. DISTRICT COURT, LLOYD D. GEORGE U.S. COURTHOUSE
333 Las Vegas Boulevard South, Las Vegas, NV 89101

FROM: BANKRUPTCY COURT FOR THE DISTRICT OF NEVADA -SOUTHERN
DISTRICT OFFICE NO. 0978/2

CASE NAME: THE LITIGATION TRUST OF THE RHODES COMPANIES LLC, ET
AL., Plaintiff(s) vs. JAMES M. RHODES, ET AL, Defendant(s)

US DISTRICT COURT NO.: 12-cv-01272-MMD-VCF

BANKRUPTCY NO: 09-14814-LBR

ADVERSARY NO: 12-01099-LBR

BANKRUPTCY JUDGE: LINDA B. RIEGLE

DATE OF REPORT OF FINDINGS AND RECOMMENDATIONS: 07/26/2013

DATE OF ENTRY OF ORDER: 07/26/2013

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S/ MELISSA R. BREAREY

DEPUTY CLERK



Honorable Linda B. Riegle
United States Bankruptcy Judge



Entered on Docket
July 26, 2013

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re: THE RHODES COMPANIES, LLC
aka "Rhodes Homes," et al.,

Reorganized Debtors

THE LITIGATION TRUST OF THE
RHODES COMPANIES LLC, et al

Plaintiff

vs.

JAMES M RHODES, JOHN C RHODES,
SEDORA HOLDINGS LLC, SAGEBRUSH
ENTER. INC., GYPSUM RESOURCES, LLC
TRUCKEE SPRINGS HOLDINGS INC.,
JOHN C. RHODES, TRUSTEE OF THE
JAMES M. RHODES DYNASTY TRUSTS I
AND II, TOCK LP, AMERICAN LAND MGMT.
LLC, SOUTH DAKOTA CONSERVANCY LLC,
MERIDIAN LAND CO., LLC, RHODES
RANCH LLC, HARMONY HOMES INC.,
NORTH 5TH LLC, FARM HUALAPAI LLC,
HARMONY 2 LLC, HAYDEN SPRINGS
PARTNERS LLC and TROPICAL SANDS LLC

Defendants

JAMES M. RHODES, SAGEBRUSH ENTER.,
INC., JOHN C. RHODES, TRUSTEE OF THE
JAMES M. RHODES DYNASTY TRUSTS I
AND II, AND RHODES RANCH, LLC

Third-Party Plaintiffs

BK-S-09-14814-LBR
(Jointly Administered)

Chapter 11
Adv.:#12-1099-LBR

District Case 2:12-cv-01272-MMD

Date: May 7, 2013
Time: 1:30 p.m.

1 vs.)
 2 CREDIT SUISSE AG, CREDIT SUISSE)
 3 GROUP AG, CREDIT SUISSE HOLDINGS)
 4 (USA), INC., CREDIT SUISSE (USA), INC.)
 5 CREDIT SUISSE SECURITIES(USA),LLC,)
 6 CUSHMAN & WAKEFIELD OF)
 7 NEVADA, INC., CUSHMAN OF TEXAS,)
 8 INC. & CUSHMAN & WAKEFIELD, INC.)
 9
 10 Third-Party Defendants)
 11
 12)
 13)
 14)
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 16)
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 19)
 20)
 21)
 22)
 23)
 24)
 25)
 26)

**REPORT AND RECOMMENDATION CONTAINING PROPOSED FINDINGS
 AND RECOMMENDATIONS ON CUSHMAN & WAKEFIELD’S MOTION TO DISMISS
 AND CREDIT SUISSE’S MOTION TO DISMISS**

This Report and Recommendation is made to the Honorable Miranda M. Du pursuant to 28 U.S.C. §157(c)(1) and FED. R. BANKR. P. 9033. Before the court is the Motion to Dismiss filed by Cushman & Wakefield, Inc., Cushman & Wakefield of Texas, Inc., and Cushman & Wakefield of Nevada (collectively the “Cushman & Wakefield Entities”)(Doc. No. 232). Also before the court is the Motion to Dismiss filed by Credit Suisse AG, Cayman Islands Branch, Credit Suisse Securities (USA) LLC, Credit Suisse Holdings (USA), Inc., Credit Suisse (USA), and Credit Suisse AG, New York Branch (collectively “Credit Suisse”)(Doc. No. 229).

For the reasons explained in this Report, the court recommends that the Motion to Withdraw the Reference filed by the Cushman & Wakefield Entities be granted, and that the Motion to Dismiss of the Cushman & Wakefield Entities be heard by the District Court because of the questionable authority of the bankruptcy court to make proposed findings and conclusions on the substantive matters raised in their motion. This court also recommends that the decision on Credit Suisse’s Motion to Dismiss be deferred until the District Court rules on a pending Motion to Withdraw the Reference that has been filed by the Cushman & Wakefield Entities and its pending Motion to Dismiss.

Background

The Rhodes Companies, LLC and certain of its affiliates (the “Debtors”)¹ filed chapter 11 petitions on March 31, 2009 and April 1, 2009.² The plaintiff is the Litigation Trust of the Rhodes Companies, LLC (the “Trust”), which was created pursuant to the Third Amended Modified Plan of Reorganization for the Rhodes Companies (the “Plan”).³ Under the Plan, the Trust obtained the right to enforce the Debtors’ causes of action,⁴ and it filed a 16-count complaint on May 11, 2012 alleging mostly fraudulent transfer-based claims.⁵ A core allegation in the Litigation Trust’s complaint is that James M. Rhodes and certain of his related entities caused the Rhodes Companies to enter into a \$500 million credit facility (“\$500MM Credit Facility”) for the benefit of James Rhodes and his entities, thereby rendering them to be over-leveraged and insolvent. Those claims are now pending in the adversary proceeding initiated by the Litigation Trust.

On June 29, 2012, a Motion to Withdraw the Reference of the adversary proceeding was filed.⁶ The District Court denied the motion, ruling that the bankruptcy court would hear the pre-

¹The debtors are Heritage Land Company, LLC, Rhodes Companies, LLC; Rhodes Ranch General Partnership; Tick, LP; Glynda, LP; Chalkline, LP; Batcave, LP; Jackknife, LP; Wallboard, LP; Overflow, LP; Rhodes Ranch Golf and Country Club; Tuscany Acquisitions, LLC; Tuscany Acquisitions II, LLC; Tuscany Acquisitions III, LLC; Tuscany Acquisitions IV, LLC; Parcel 20 LLC; Rhodes Design and Development Corp.; C&J Holdings, Inc.; Rhodes Realty, Inc.; Jarupa LLC; Elkhorn Investments, Inc.; Rhodes Homes Arizona, LLC; Rhodes Arizona Properties, LLC; Tribes Holdings LLC; Six Feathers Holdings, LLC; Elkhorn Partners; Bravo Inc.; Gung-Ho Concrete, LLC; Geronimo Plumbing, LLC; Apache Framing, LLC; Tuscany Golf Country Club; and Pinnacle Grading, LLC.

²The cases were ordered to be jointly administered in April 2009. BK-S-09-14814 Doc. No. 22.

³BK-S-09-14814 Doc. No. 1013, Article IV, ¶ O, p. 29.

⁴BK-S-09-14814 Doc. No. 1013, Article IV, ¶ O, p. 29; Exhibit I to Doc. No. 713 ¶ 6.1.

⁵Doc. No. 1.

⁶BK-S-09-14814 Doc. No. 1721.

1 trial motions and present reports and recommendations to the District Court.⁷

2 Now, James Rhodes, Sagebrush Enterprises, John C. Rhodes Trustee of the James M.
3 Rhodes Dynasty Trust I, John C. Rhodes Trustee of the James M. Rhodes Dynasty Trust II, and
4 Rhodes Ranch LLC (collectively the “Third-Party Plaintiffs”) have filed a Third-Party Complaint
5 against the Cushman & Wakefield Entities and against Credit Suisse. The Third-Party Complaint
6 is pled almost entirely in the alternative. The Third-Party Complaint alleges this:

7 [I]n the unlikely event it is determined that the terms of the \$500
8 MM Credit Facility positioned the Borrowers and other collateral-
9 pledging, obligation-guaranteeing entities in the Rhodes Homes
enterprise to fail, then Credit Suisse, for the roles it played in the
\$500MM Credit Facility, is liable for all or part of the Litigation
Trusts’s claims against the Third-Party Plaintiffs.”⁸

10 No action has been commenced by the Liquidating Trust against the Cushman &
11 Wakefield Entities or Credit Suisse. On April 8, 2013, the Cushman Entities filed a Motion to
12 Withdraw the Reference.⁹ Credit Suisse has not moved for a withdrawal of the reference.
13 Both the Cushman & Wakefield Entities and Credit Suisse have filed motions to dismiss.

14 ***Cushman Entities’ Motion to Dismiss***

15 The Third-Party Complaint asserts three causes of action against the Cushman &
16 Wakefield Entities for negligence, equitable indemnity, and contribution for appraisals allegedly
17 prepared by them. All are pled in the alternative. The causes of action for equitable indemnity and
18 contribution seek relief based upon the possibility that if James Rhodes and certain of his non-
19 debtor affiliates (the “Rhodes Defendants”) are found liable in the Litigation Trust’s action, then
20 the Cushman & Wakefield Entities should be liable to the Rhodes Defendants.

22 ⁷BK-S-09-14814 Doc. No. 1735.

23 ⁸Third-Party Complaint and Demand for Jury Trial,” Doc. No. 178.

24 ⁹Doc. No. 236. The court notes that on account of a clerical error, however, the matter was
25 not assigned to Judge Du.

1 The Cushman & Wakefield Entities argue in their Motion to Dismiss that “the Court does
 2 not have subject matter jurisdiction.”¹⁰ It is unclear to this court whether the Cushman &
 3 Wakefield Entities are arguing that the *bankruptcy court* does not have subject matter jurisdiction,
 4 or whether the *District Court* lacks subject matter jurisdiction. Clearly, after *Stern v. Marshall*,
 5 ____ U.S. ____, 131 S.Ct 2595 (2011), as determined by the District Court in its Order,¹¹ the
 6 bankruptcy court can enter only proposed findings and conclusions with respect to the matters
 7 contained in the proceeding between the Litigation Trust and the Rhodes Defendants. *See also, In*
 8 *re Bellingham Ins. Agency*, 702 F.3d 553 (2012), *cert. granted*, 2013 WL 3155257
 9 (2013)(bankruptcy courts have authority to enter proposed findings and conclusions in fraudulent
 10 conveyance proceedings subject to de novo review by the district court). In none of these
 11 decisions, however, was the issue of subject matter jurisdiction raised.

12 The jurisdiction relied upon by the Third-Party Plaintiffs in the Third-Party Complaint is
 13 that given by 28 U.S.C. 1367.¹² In order for the district court to exercise supplemental jurisdiction,
 14 it must be shown that the claims are “so related to claims in the action within such original
 15 jurisdiction that they form part of the same case or controversy under Article III of the United
 16 States Constitution.” 28 U.S.C. § 1367 provides, in part:

17 (a) Except as provided in subsections (b) and (c) or as expressly
 18 provided otherwise by Federal statute, in any civil action of which
 19 the district courts have original jurisdiction, the district courts shall
 20 have supplemental jurisdiction over all other claims that are so
 21 related to claims in the action within such original jurisdiction that
 22 they form part of the same case or controversy under Article III of

23 ¹⁰Cushman Entities Motion to Dismiss, Doc. No. 232, p.7, line 19.

24 ¹¹BK-S-09-14814, Doc. No. 1735. The District Court, in its Order, ruled that it is the
 25 proper venue for trial of the numerous non-core claims of the Litigation Trust, not the bankruptcy
 26 court, even though the bankruptcy court could adjudicate the pre-trial motions

¹²Complaint, Doc. No. 178, ¶ 24.

the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

At first blush, one might assume that the bankruptcy court could enter proposed findings and conclusions with respect to this issue as would a magistrate judge. However, the authority given to bankruptcy judges to hear matters subject to review by the District Court is not as broad as that given to magistrate judges. Under 28 U.S.C. § 157, bankruptcy judges may hear a proceeding that is not a core proceeding but is otherwise *related to a case under title 11*. In such a proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the District Court, and any final order or judgment shall be entered by the District Court. Thus the bankruptcy court may only make proposed findings and conclusions in a rather narrow category of cases. In contrast, magistrate judges may conduct hearings on a broad range of dispositive pretrial motions, subject to submitting their findings to the District Court. *See* 28 U.S.C. § 636(b)(1)(B).

Here, the third party complaint is not in any manner related to a case under title 11. In the Ninth Circuit the test to determine whether a civil proceeding is “related to” a bankruptcy case is:

[W]hether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

In re Feitz, 852 F.2d 455, 457 (9th Cir. 1988)(adopting the definition in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984).¹³

Accordingly, this court recommends that the Cushman & Wakefield Entities’ Motion to Withdraw the Reference be granted and that all substantive matters be determined by the District Court judge, subject to the judge’s right to designate matters to a magistrate.

¹³This court makes no proposed finding about whether or not the Third-Party Complaint meets the test of 28 U.S.C. § 1367.

Credit Suisse's Motion to Dismiss

This court recommends that a determination of Credit Suisse's Motion to Dismiss be deferred until the District Court rules on Cushman & Wakefield's Motion to Withdraw the Reference and its Motion to Dismiss. While Credit Suisse has impliedly consented to review by the bankruptcy court of the Motion to Dismiss, the Third-Party Complaint against the Cushman & Wakefield Entities is so entwined as to make the matters difficult to segregate if Cushman's Motion to Dismiss is not granted. If the Motion to Dismiss of the Cushman & Wakefield Entities is not granted, it is recommended that the Third-Party Complaint against Credit Suisse should also be heard and determined by the District Court.

Recommendation

For all of the reasons explained above, **IT IS RECOMMENDED** that the Motion to Withdraw the Reference of the Cushman & Wakefield Entities be granted and that all substantive matters be determined by the District Court. This court further **RECOMMENDS** that the decision on Credit Suisse's Motion to Dismiss be deferred until the District Court rules on Cushman & Wakefield's Motion to Withdraw the Reference and its Motion to Dismiss. It is further recommended that the Third-Party Complaint be severed pursuant to FED. R. CIV. P. 14, applicable in adversary proceedings under FED. R. BANKR. P. 7014.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

THE RHODES COMPANIES, LLC, aka
"Rhodes Homes," et al.,

Debtors.

THE LITIGATION TRUST OF THE
RHODES COMPANIES, LLC, ET AL.,

Plaintiff,

v.

JAMES M. RHODES, SEDORA HOLDINGS,
LLC, SAGEBRUSH ENTERPRISES, INC.,
GYPSUM RESOURCES, LLC, TRUCKEE
SPRINGS HOLDING, INC., JOHN C.
RHODES, JOHN C. RHODES, TRUSTEE OF
THE JAMES M. RHODES DYNASTY
TRUST I, JOHN C. RHODES, TRUSTEE OF
THE JAMES M. RHODES DYNASTY
TRUST, II, HARMONY HOMES, INC.,
NORTH 5, LLC, FARM HUALAPAI, LLC,
HARMONY 2, LLC, HAYDEN SPRINGS
PARTNERS, LLC, TROPICAL SANDS, LLC,
and RHODES RANCH, LLC,

Defendants.

Case No. BK-S-09-14814-LBR
Adv. No. BK-S-12-01099-LBR
District Case No. 2:12-cv-01272-MMD

Chapter 11

**MOTION OF CREDIT SUISSE AG,
CAYMAN ISLANDS BRANCH; CREDIT
SUISSE SECURITIES (USA) LLC;
CREDIT SUISSE HOLDINGS (USA),
INC.; CREDIT SUISSE (USA), INC.; AND
CREDIT SUISSE AG, NEW YORK
BRANCH TO DISMISS RHODES
ENTITIES' THIRD-PARTY
COMPLAINT**

JAMES M. RHODES, SAGEBRUSH
ENTERPRISES, INC., JOHN C. RHODES,
TRUSTEE OF THE JAMES M. RHODES
DYNASTY TRUST I, JOHN C. RHODES,
TRUSTEE OF THE JAMES M. RHODES
DYNASTY TRUST, II, and RHODES
RANCH, LLC,

Third-Party Plaintiffs,

v.

CREDIT SUISSE AG, a Swiss corporation;
CREDIT SUISSE GROUP AG, a Swiss
corporation; CREDIT SUISSE SECURITIES
(USA), LLC, a Delaware limited liability
company, f/k/a CREDIT SUISSE FIRST
BOSTON, LLC a/k/a CREDIT SUISSE AG
NEW YORK BRANCH f/k/a CREDIT
SUISSE, NEW YORK BRANCH, an entity of
unknown type, and a/k/a CREDIT SUISSE
AG, CAYMAN BRANCH f/k/a CREDIT
SUISSE, CAYMAN ISLANDS BRANCH, an
entity of unknown type; CREDIT SUISSE
(USA), INC, a Delaware corporation, f/k/a
CREDIT SUISSE FIRST BOSTON, INC. a/k/a
CREDIT SUISSE AG NEW YORK BRANCH
f/k/a CREDIT SUISSE, NEW YORK
BRANCH, an entity of unknown type, and
a/k/a CREDIT SUISSE AG, CAYMAN
BRANCH f/k/a CREDIT SUISSE, CAYMAN
ISLANDS BRANCH, an entity of unknown
type; CREDIT SUISSE HOLDINGS (USA)
INC., a Delaware corporation; CREDIT
SUISSE AG, NEW YORK BRANCH f/k/a
CREDIT SUISSE, NEW YORK BRANCH, an
entity of unknown type; CREDIT SUISSE AG,
CAYMAN BRANCH f/k/a CREDIT SUISSE,
CAYMAN ISLANDS BRANCH, an entity of
unknown type; CUSHMAN & WAKEFIELD
OF NEVADA, INC., a Delaware corporation;
CUSHMAN & WAKEFIELD OF TEXAS,
INC., a Texas corporation; CUSHMAN &
WAKEFIELD, INC., a New York corporation,

Third-Party Defendants.

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7	<u>Trulis v. Barton,</u>	
8	107 F.3d 685 (9th Cir. 1995)	6
9	<u>United Int’l Holdings v. Wharf Ltd.,</u>	
10	988 F. Supp. 367 (S.D.N.Y. 1997).....	18
11	<u>Vanguard Mun. Bond Fund, Inc. v. Cantor, Fitzgerald L.P.,</u>	
12	40 F.Supp.2d 183 (S.D.N.Y. 1999).....	10, 13
13	<u>Vidor v. Am. Int’l Group, Inc.,</u>	
14	491 Fed. Appx. 828, 2012 U.S. App. LEXIS 23900, Case No. 11-16828	
15	(9th Cir. Nov. 20, 2012).....	10
16	<u>William L. Crow Constr. Co. v. Quickway Metal Fabricators, Inc.,</u>	
17	155 A.D.2d 295, 547 N.Y.S.2d 59 (1st Dep’t 1989)	17
18	<u>Williams v. State,</u>	
19	90 A.D.2d 861, 456 N.Y.S.2d 491 (3d Dep’t 1982)	10, 13
20	<u>Wooten v. Countrywide Home Loans, Inc.,</u>	
21	Case No. CIV S-11-1791 MCE DAD PS, 2012 U.S. Dist. LEXIS 12027	
22	(E.D. Cal. Feb. 1, 2012)	11

STATUTES

23	11 U.S.C. § 1144.....	2, 8, 9
24	Federal Rule of Bankruptcy Procedure 7009(b)	1
25	Federal Rule of Bankruptcy Procedure 7012(b)	1
26	Federal Rule of Civil Procedure 9(b).....	1, 2, 10
27	Federal Rule of Civil Procedure 12(b)(6)	1

Third-Party Defendants Credit Suisse AG, Cayman Islands Branch (formerly known as Credit Suisse, Cayman Islands Branch), Credit Suisse Securities (USA) LLC, Credit Suisse Holdings (USA), Inc., Credit Suisse (USA), Inc., and Credit Suisse AG, New York Branch (collectively, “Credit Suisse”) hereby move, pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) and Federal Rules of Bankruptcy Procedure 7009(b) and 7012(b), to dismiss the Third-Party Complaint of James M. Rhodes, Sagebrush Enterprises, Inc., John C. Rhodes, trustee of the James M. Rhodes Dynasty Trust I, John C. Rhodes, trustee of the James M. Rhodes Dynasty Trust II and Rhodes Ranch, LLC (collectively, the “Rhodes Entities”). This Motion is based on the Memorandum of Points and Authorities below, the Request for Judicial Notice filed concurrently herewith, the pleadings and papers in the Court’s files, and the argument of counsel at the hearing of this Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

More than three years ago, this Court confirmed the Third Amended Modified Plan of Reorganization (“Plan”), which Plan was consummated. The Plan was the product of extensive negotiations and a settlement among the Rhodes Entities, Debtors, the Creditors Committee and lenders (including Credit Suisse). Pursuant to the Plan, a Litigation Trust was established for the purpose of pursuing the very claims asserted by the Litigation Trust against the Rhodes Entities -- with all recoveries to be distributed pursuant to the terms of the Plan. Now, in a transparent attempt to circumvent their settlement and this Court’s Order confirming the Plan, the Rhodes Entities seek to deprive Credit Suisse of its bargained-for benefits under the Plan and impose liability (where none exists) on Credit Suisse for the Rhodes Entities’ alleged misconduct. As discussed more fully below, each of the claims asserted in the Third-Party Complaint should be dismissed with prejudice.

First, all claims are barred since they rest on arguments that could have been raised as objections to the Plan before confirmation and are now precluded under the doctrine of *res judicata*.

Second, all claims are barred by the April 30, 2009 Cash Collateral Order, which required the Rhodes Entities to pursue any claims against Agent and Lenders before the earlier of March 31, 2010 or the Effective Date of the Plan -- and, upon a failure to do so, all such claims were “forever

1 relinquished, released and waived.”

2 Third, all claims are barred because they effectively seek to revoke confirmation of the Plan
3 long after the 180-day deadline imposed by 11 U.S.C. § 1144.

4 Fourth, the negligent misrepresentation claims (first and second causes of action) should be
5 dismissed on the independent grounds that they (i) fail to meet the heightened pleading requirements
6 of Federal Rule of Civil Procedure 9(b), (ii) are time-barred by the applicable limitations period, and
7 (iii) fail to state a claim for relief because they do not allege the requisite elements.

8 Fifth, the third cause of action for equitable indemnity fails to state a claim for relief since
9 (i) the Rhodes Entities do not (and cannot) allege any duty owed by Credit Suisse to the Rhodes
10 Entities, and (ii) it is premised on a finding that the Rhodes Entities engaged in wrongful conduct --
11 which finding precludes equitable indemnity.

12 Sixth, the fourth cause of action for contribution fails to state a claim for relief since the
13 Rhodes Entities do not (and cannot) allege any duty owed by Credit Suisse to the Rhodes Entities or
14 the Litigation Trust -- or a breach thereof -- giving rise to Credit Suisse’s liability for the Rhodes
15 Entities’ misconduct as asserted by the Litigation Trust.

16 Finally, the fifth cause of action for breach of contract fails to state a claim for relief because
17 (i) the Rhodes Entities are not third-party beneficiaries of the agreements allegedly breached, and
18 (ii) the filing of the Litigation Trust Complaint does not violate the non-recourse provisions of those
19 agreements.

20 **II. FACTUAL AND PROCEDURAL BACKGROUND**

21 **A. The 2005 Credit Agreements**

22
23 On or about November 21, 2005, Heritage Land Company, LLC, Rhodes Ranch, G.P., and
24 The Rhodes Companies, LLC (collectively, “Borrowers”) entered into a \$430 million Senior
25 Secured Credit Facility (First Lien) and a \$70 million Senior Secured Credit Facility (Second Lien)
26 (collectively, the “2005 Credit Agreements”). (Third-Party Complaint (“TPC”) [Adv. Dkt. No. 178],
27 ¶¶ 1, 46.) Thereafter, and as a result of the “unprecedented (and unforeseen) collapse” of the
28 national real estate and housing markets, Borrowers (i) failed to repay the amounts owed to Credit

Suisse and Lenders, and (ii) were forced to file Chapter 11 proceedings. (TPC, ¶¶ 52, 53.)

B. Chapter 11 Petitions, Cash Collateral Order, And Third Amended Reorganization Plan

1. The Chapter 11 Petitions And The Cash Collateral Order

On or about March 31, 2009, The Rhodes Companies, LLC and certain of its affiliates and subsidiaries (collectively, “Debtors”) filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. (TPC, ¶¶ 21, 53.) On April 30, 2009, the Court entered a final stipulated order authorizing Debtors’ use of cash collateral (the “Cash Collateral Order”).¹ Pursuant to the Cash Collateral Order, all non-Debtor parties in interest were required to, among other things, “pursue claims or causes of action against” Agents or Lenders (including Credit Suisse) prior to the termination of the “Challenge Period,” or such claims and causes of action were deemed “forever relinquished, released and waived” by any “person or entity”.² The “Challenge Period” was extended on multiple occasions, with the last extension through the earlier of (i) March 31, 2010, or (ii) the Effective Date of the Plan.³

2. The Mediation Settlement And Third Amended Plan Of Reorganization

On December 1, 2009, the Court entered the Order approving, among other things, the First Lien Steering Committee’s Second Amended Modified Disclosure Statement (“Disclosure Statement”) for the Second Amended Modified Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code for the Rhodes Companies, LLC, *et. al.* (“Second Amended Plan”). The Disclosure Statement confirmed that the Second Amended Plan was “the product of extensive negotiations and settlement” reached among the First Lien Steering Committee (which included Credit Suisse), Debtors, James Rhodes, the Rhodes Entities, the Creditors Committee and the

¹ See Request for Judicial Notice (“RJN”), filed concurrently herewith, Ex. A (April 30, 2009 Cash Collateral Order [Dkt. No. 126])). The Cash Collateral Order and all other documents referred to in this Motion are properly before the Court on a motion to dismiss because they are: (a) part of the Court’s “public record,” and therefore subject to judicial notice, *see e.g., Intri-Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007); and/or (b) referred to in the Third Party Complaint. *See e.g., Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007).

² RJN, Ex. A (April 30, 2009 Cash Collateral Order), ¶ 10.

³ RJN, Ex. B (Fifth Stipulation to Extend Cash Collateral Termination Date [Dkt. No. 1030], ¶ 2.

Second Lien Agent.⁴ On February 18, 2010, the Third Amended Modified Plan of Reorganization (the “Plan”) was filed.⁵ The Plan provides, among other things, that:

- (1) “On the Effective Date, the Litigation Trust will be implemented pursuant to the terms of the Litigation Trust Agreement”, with the Debtors to “transfer the Litigation Trust Assets for and on behalf of the Litigation Trust Beneficiaries, which will be Holders of Allowed Claims in Classes C-1, C-2 and C-3” (RJN, Ex. D (Plan), § IV. O.);⁶
- (2) The Litigation Trust Assets include, among other things, “all Claims existing against the Rhodes Entities that are not expressly released under the Plan” (RJN, Ex. D (Plan), § IV. O.);
- (3) “[T]he Litigation Trust shall retain and may enforce all rights to commence and pursue, as appropriate, any and all Causes of Action” (RJN, Ex. D (Plan), § IV. O.); and
- (4) “On the Effective Date each Holder of a First Lien Lender Deficiency Claim shall receive its pro rata share of the Litigation Trust Interests allowable to the Holders of First Lien Lender Deficiency Claims on account of its Allowed Claim” (RJN, Ex. D (Plan), § III.B.6.c., 7.c.; § IV. O.).

On March 12, 2010, the Court entered the Confirmation Order, which provides, among other things, that: (a) “the Mediation Settlement (as modified by the Plan) is fair, equitable and reasonable and is hereby approved”; and (b) “the settlements, compromises, releases, discharges, exculpations and injunctions set forth in Article VIII of the Plan are fair, reasonable, in good faith” and “are

⁴ RJN, Ex. C (Disclosure Statement), p. 1, lines 15-18; and Ex. 1 (Mediation Term Sheet) to Ex. A (Second Amended Plan) thereto.

⁵ RJN, Ex. D (Proposed Findings of Fact, Conclusions of Law and Order Confirming Third Amended Plan (“Confirmation Order”)), which attaches as Exhibit A the Third Amended Plan [Dkt. No. 1053].

⁶ Litigation Trust Beneficiaries are defined as “[t]he Holders of Claims that are to be satisfied, in whole or in part, by post-Effective Date distributions that are to be made by the Litigation Trust.” (RJN, Ex. D (Plan), § I.A.85.) Class C-2 consists of First Lien Lender Deficiency Claims (including Credit Suisse) and Class C-3 consists of Second Lien Lender Deficiency Claims. (*Id.* at § III.B.6.c., 7.c.)

1 integral components of the Mediation Settlement (as modified by the Plan) that is embodied in the
2 Plan” (RJN, Ex. D (Confirmation Order), ¶¶ 18, 20).

3 **C. The Litigation Trust Complaint**

4 On May 11, 2012, the Litigation Trust filed a Complaint against the Rhodes Entities (the
5 “Litigation Trust Complaint” [Adv. Dkt. No. 1]). On January 11, 2013, the Rhodes Entities filed an
6 Answer to the Litigation Trust Complaint (“Answer”) [Adv. Dkt. No. 176]).

7 The Litigation Trust Complaint alleges various breaches of fiduciary duty, fraudulent
8 transfers and other misconduct by and of the Rhodes Entities, and asserts claims for: (1) breach of
9 fiduciary duty; (2) aiding and abetting breach of fiduciary duty; (3) alter ego/piercing the corporate
10 veil; (4) unjust enrichment; (5) avoidance and recovery of fraudulent transfers; (6) recovery of
11 avoidable transfers; and (7) declaratory relief, turnover and avoidance of transfer.⁷

12 **D. The Third-Party Complaint**

13 On January 25, 2013, the Rhodes Entities filed the Third-Party Complaint [Adv. Dkt. No.
14 178], which, from its vague allegations, appears to be based on two fatally defective grounds.

15 First, the Rhodes Entities assert that Credit Suisse fraudulently induced the Rhodes Entities
16 and/or the “Rhodes Home enterprise” to allow Borrowers to enter into the 2005 Credit Agreements
17 by virtue of the Rhodes Entities’ alleged receipt of an appraisal prepared by Cushman & Wakefield,
18 which appraisal utilized a “total net value” methodology (the “2005 C&W Total Net Value
19 Appraisal”). (TPC, ¶¶ 43, 60, 61, 68, 71-73, 77.) Nowhere, however, is it alleged how the 2005
20 C&W Total Net Value Appraisal -- the methodology of which was known by the Rhodes Entities
21 before Borrowers entered into the 2005 Credit Agreements (TPC, ¶ 43) -- misrepresented anything.

22 Second, the Rhodes Entities allege that Credit Suisse -- “after agreeing to insulate itself from
23

24 ⁷ Of the sixteen count Litigation Trust Complaint, *only two counts* -- breach of fiduciary duty and
25 aiding and abetting same (Counts 1 and 2) -- are based on the alleged conduct of the Rhodes Entities
26 in causing the Borrowers to enter into the 2005 Credit Agreements. The remaining fourteen counts
27 are based on: (a) the Rhodes Entities’ alleged misconduct after entering into the 2005 Credit
28 Agreements in transferring cash and other benefits from Debtors to or for the benefit of the Rhodes
Entities for no consideration or benefit in exchange therefor (Counts 4 through 13); (b) alter ego as
to James Rhodes and Sagebrush Enterprises, Inc. (Count 3); and (c) the wrongful transfer of a 99%
membership interest in Gypsum Resources, LLC to the Rhodes Entities (Counts 14, 15, 16).

any liability for the 2005 loan transaction as part of the Plan” -- breached the 2005 Credit Agreements by “directing, participating in, and standing to benefit from” the filing of the Litigation Trust’s Complaint. (TPC, ¶¶ 58, 94.) In particular, the Rhodes Entities allege that the Litigation Trust Complaint (with resulting recoveries to be distributed to Credit Suisse and Lenders on account of their allowed bankruptcy claims) is a breach of the non-recourse provisions of Section 9.21 of the 2005 Credit Agreements.

III. THE DOCTRINE OF RES JUDICATA BARS THE THIRD-PARTY COMPLAINT

“Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that *could have been raised* pertaining to the plan are entitled to *res judicata* effect.” Trulis v. Barton, 107 F.3d 685, 691 (9th Cir. 1995) (emphasis added).⁸

The Rhodes Entities’ current attempt to litigate issues which could have been raised as objections to confirmation of the Plan -- including lender liability claims based on alleged fraudulent inducement in causing Borrowers to enter into the 2005 Credit Agreements and the alleged breach of those agreements based on the filing of the Litigation Trust Complaint -- is an improper collateral attack on the Plan. Indeed, well before Plan confirmation (and after participating in extensive settlement negotiations and a three-day mediation with, among others, Credit Suisse),⁹ the Rhodes Entities knew that: (a) interests in the Litigation Trust were to be distributed pursuant to the Plan, which specifically provided that the First and Second Lien Lenders (including Credit Suisse) “shall receive [their] pro rata share of the Litigation Trust Interests” on account of the allowed deficiency claims; (b) the First and Second Lien Lenders (including Credit Suisse) would benefit from any

⁸ See also In re Pardee, 193 F.3d 1083, 1086 (9th Cir. 1999) (“[i]t is absolutely incumbent upon a creditor to take an active role in protecting its interests, and a creditor which fails to do so is in a poor position to later complain about an adverse result.”); In re Heritage Hotel Partnership I, 160 B.R. 374, 377-78 (9th Cir. BAP 1993) aff’d mem. 59 F.3d 175 (9th Cir. 1995) (debtor’s equity holders’ claims barred by confirmed plan because “[i]t is now well-settled that a bankruptcy court’s confirmation order is a binding, final order, accorded full *res judicata* effect and precludes the raising of issues which could or should have been raised during the pendency of the case, such as typical lender liability causes of action”).

⁹ (TPC, ¶ 85; RJN, Ex. C (Disclosure Statement), p. 1, lines 15-18; Ex. 1 (Mediation Term Sheet) attached to Ex. A (Second Amended Plan) to Disclosure Statement).

recoveries by the Litigation Trust in connection with claims against the Rhodes Entities; and (c) that the Litigation Trust contemplated bringing the very claims asserted in the Litigation Trust Complaint.¹⁰ In short, if the Rhodes Entities believed that they had viable causes of action against Credit Suisse related to the 2005 Credit Agreements which would have affected Credit Suisse's treatment under the Plan (including those alleged in the Third-Party Complaint), they were required to assert such claims during the confirmation process. Any attempt to raise such claims three years after Plan confirmation is barred.

IV. THE CASH COLLATERAL ORDER BARS THE THIRD-PARTY COMPLAINT

All of the Rhodes Entities' claims are barred by the Cash Collateral Order, which provides, in part:

[T]he extent, validity, priority, perfection, and enforceability of the First Priority Indebtedness, First Priority Liens [. . .] are for all purposes subject to the rights of any party in interest [. . .] to (1) file a complaint pursuant to Bankruptcy Rule 7001, (2) object to the allowability of any of, or any portion of, the Lender Parties' liens or claims [. . .], or (3) take such other action or seek another mechanism seeking to invalidate, avoid, subordinate or otherwise challenge the First Priority Indebtedness, First Priority Liens, [. . .] or any liens, claims or other obligations incurred in connection with any of the foregoing ***or pursue claims or causes of action against the First Lien Agent, First Lien Lenders, Second Lien Agent and/or Second Lien Lenders, applicable*** (each of (1)-(3) above, a "Challenge").

(RJN, Ex. A ¶ 10 (emphasis added).)

Pursuant to the Cash Collateral Order, any claims against Credit Suisse (as Agent or First Lien Lender) constituted a Challenge. If no Challenge was asserted during the Challenge Period, any and all Challenges were (i) "deemed to have been forever relinquished, released and waived", and (ii) "not [] subject to any other or further claims, causes of action, objection, contest, setoff, defense or challenge by any party in interest for any reason". (*Id.*, ¶¶ 10, 11.)

Given the Rhodes Entities' failure to timely "pursue claims or causes of action" against Credit Suisse, all such claims were "forever relinquished, released and waived", and must be dismissed. See In re Fitness Holdings, Intern., Inc., No. CV 10-0647 AG, 2011 WL 7763674 (C.D.

¹⁰ See Section I.B.2., above.

Cal. Aug. 31, 2011) (dismissing creditors' committee complaint against lender where committee failed to assert challenge within the time frame imposed by cash collateral order).¹¹

V. THE THIRD-PARTY COMPLAINT IS BARRED BY 11 U.S.C. § 1144

The Third-Party Complaint seeks damages, contribution and equitable indemnity based on (i) a finding that if the Litigation Trust prevails in its claims against the Rhodes Entities, then (ii) Credit Suisse is liable to the Rhodes Entities for any judgment or recovery obtained by the Litigation Trust (which recoveries would be distributed to Credit Suisse and all other Lenders on account of allowed claims), and (iii) as a result, Credit Suisse must "give back" any such recovery or judgment against the Rhodes Entities as "damages" (including all amounts received and retained by Credit Suisse and all other Lenders). Simply put, the Third-Party Complaint is a transparent attempt by the equity holders of Debtors to challenge post-confirmation Credit Suisse's entitlement to a distribution under the Plan. Indeed, the Rhodes Entities seek to "re-divide the pie" and upset the confirmed Plan by: (a) preventing Credit Suisse from obtaining that which was bargained for in the settlement negotiations and mediation with the Rhodes Entities, and confirmed in the Plan -- i.e., the receipt and retention by Credit Suisse of its pro rata share of any and all proceeds recovered by the Litigation Trust against the Rhodes Entities; and (b) attempting to seek as damages against Credit Suisse *all* amounts that the Litigation Trust recovers against the Rhodes Entities. (TPC, ¶¶ 85, 89, 96.)

"An order confirming a Chapter 11 reorganization plan may be revoked only in accordance with 11 U.S.C. § 1144," which provides that, "[o]n request of a party in interest at any time *before 180 days after the date of the entry of the order of confirmation*, . . . the court may revoke such order if and only if such order was procured by fraud." In re Orange Tree Assocs., Ltd., 961 F.2d 1445, 1447 (9th Cir. 1992) (quoting § 1144) (emphasis added)). The 180-day deadline imposed by

¹¹ In addition, the Cash Collateral Order, like the Plan, is entitled to *res judicata* effect and, as such, bars the Rhodes Entities' claims. I.R.S. v. Patriot Contracting Corp., Civ. A. No. 06-2133 (JLL), 2007 WL 433392 at *8 (D.N.J. Feb. 7, 2007) (holding that cash collateral order constitutes a final judgment for purposes of *res judicata*).

§ 1144 is absolute and a court has no authority to extend the time period. *Id.*¹² Moreover, Section 1144 applies not only to a motion or other explicit request to revoke confirmation, but also to any claim for relief, including damages or other monetary relief against a non-debtor, that would effectively “redivide the pie” or “upset the confirmed plan.” *In re California Litfunding*, 360 B.R. 310, 320 (Bkrcty. C.D. Cal., 2007); see also *id.* at 317-18 (parties cannot avoid § 1144’s requirements “by simply characterizing the attempt as an independent cause of action rather than a motion to revoke the [confirmation] order” (citing additional cases)). Granting any of the relief sought in the Third-Party Complaint would “redivide the pie” and “upset the plan” by, among other things, effectively preventing or avoiding the distribution of the Litigation Trust Assets to Credit Suisse as required by the Plan. *In re California Litfunding*, 360 B.R. at 321.¹³ Because the Rhodes Entities failed to bring such claims within the 180-day deadline imposed by § 1144, such claims are barred.

VI. THE NEGLIGENT MISREPRESENTATION CLAIMS FAIL TO STATE A CLAIM

The Rhodes Entities’ first cause of action (negligence) and second cause of action (negligent misrepresentation) (collectively, the “Negligent Misrepresentation Claims”) are identical to one another in all material respects. Both claims are based upon the same vaguely-referenced representations (TPC, ¶¶ 60, 72), and both allege, among other things, that (a) Credit Suisse knew or should have known the representations were false (*id.*); (b) Credit Suisse failed to exercise reasonable care when making the alleged representations (*id.*, ¶¶ 63, 75); and (c) the representations “caused” the Rhodes Entities to “allow” Borrowers to enter into the 2005 Credit Agreements, which somehow resulted in damages. (TPC, ¶¶ 65-67, 77-78, 80); (see also Exhibit 1, hereto.)¹⁴ Where, as here, a negligence claim is based on misrepresentations, such claim constitutes a negligent misrepresentation claim, and a party cannot circumvent the pleading requirements of a negligent

¹² See also *In re Newport Harbor Assoc.*, 589 F.2d 20 (1st Cir. 1978).

¹³ See also *In re Genesis Health Ventures, Inc.*, 355 B.R. 438, 444-45 (Bankr. D. Del. 2006).

¹⁴ For the convenience of the Court, Exhibit 1 is a comparison of the allegations of the first and second causes of action and confirms their identical nature.

misrepresentation claim by simply labeling it as a claim for negligence. Vanguard Mun. Bond Fund, Inc. v. Cantor, Fitzgerald L.P., 40 F.Supp.2d 183, 188 (S.D.N.Y. 1998) (negligence claim dismissed due to plaintiff's failure to meet requirements of claim for negligent misrepresentation, where negligence claim was substantively identical to negligent misrepresentation claim); Williams v. State, 90 A.D.2d 861, 862, 456 N.Y.S.2d 491 (3d Dep't 1982) (dismissing negligence claim that was "in reality . . . one for negligent misrepresentation" and did not satisfy the requirements for such a claim).

A. The Negligent Misrepresentation Claims Fail To Satisfy Rule 9(b)

As demonstrated below, the Negligent Misrepresentation Claims fail to satisfy the heightened pleading standard under Federal Rule of Civil Procedure 9(b) and must be dismissed. Vidor v. Am. Int'l Group, Inc., 491 Fed. Appx. 828, 2012 U.S. App. LEXIS 23900, Case No. 11-16828, *1-2 (9th Cir. Nov. 20, 2012) (dismissing negligent misrepresentation claim due to plaintiff's failure to meet the heightened pleading threshold of Rule 9(b)).

First, the Rhodes Entities utterly fail to identify any statements which allegedly "misled" or "induced" them into "allowing" the Borrowers to enter into the 2005 Credit Agreements. Instead, the Rhodes Entities vaguely allege that Credit Suisse made "oral misstatements", "furnished written and oral information", and made "representations (including but not limited to the Total Net Value appraisals)" to the Rhodes Entities (TPC, ¶¶ 60, 61, 72). The Rhodes Entities also refer conclusorily to the use of the term "appraisals", and "that the 'Total Net Value' appraisal Cushman & Wakefield performed was based on a methodology that was not a market value appraisal". (TPC, ¶¶ 33, 44.) Such broad brush and nebulous allegations do not meet the heightened pleading requirements of Rule 9(b), as the Rhodes Entities are required (but have failed) to (i) "state the content of any allegedly false and misleading statements", (ii) explain what, exactly, was represented to them, and (iii) allege "when and where [they] obtained the [allegedly] false information". Neubronner v. Milken, 6 F.3d 666, 673 (9th Cir. 1993); see also Davila v. BAC Home Loans Servicing, LP, Case No. 2:10-cv-02252-ECR-GWF, 2011 U.S. Dist. LEXIS 81682, *9 (D. Nev. July 26, 2011) (negligent misrepresentation claim dismissed for failure to allege "the specific content" of the representation).

1 Second, the Rhodes Entities do not identify which individuals made the alleged
 2 representations. Although the Third-Party Complaint identifies Jeff Barcy, Eric Anderson and Jeff
 3 Cohen (TPC, ¶¶ 35, 41), it does not attribute any representations to any of them specifically -- but,
 4 instead, impermissibly relies on vague references to “the misrepresentations of Third-Party
 5 Defendants” (TPC, ¶ 45), or that “Third-Party Defendants furnished written and oral information to
 6 [the Rhodes Entities]” (TPC, ¶¶ 60, 72). See Speros v. Bank of Am. N.A., Case No. 11cv1850 DMS
 7 (NLS), 2012 U.S. Dist. LEXIS 12409, at *5 (S.D. Cal. Feb. 2, 2012) (dismissing claim where, as
 8 here, plaintiff “fail[ed] to identify the individual or individuals that made [the] representations [at
 9 issue], or when, where or how those representations were made”).

10 Third, the Rhodes Entities’ generic allegation that Messrs. Barcy, Anderson and Cohen and
 11 “other [unidentified] representatives” allegedly “held themselves and Credit Suisse out to the
 12 [Rhodes Entities] as employees of Credit Suisse” (TPC, ¶ 36) is insufficient as the “plaintiff must
 13 [1] name any employees of the companies who made any specific representation and [2] must
 14 indicate their authority to speak for the company, to whom they spoke and what specifically was said
 15 or written[.]” Wooten v. Countrywide Home Loans, Inc., Case No. CIV S-11-1791 MCE DAD PS,
 16 2012 U.S. Dist. LEXIS 12027, *17-18 (E.D. Cal. Feb. 1, 2012).

17 Finally, the Rhodes Entities fail to allege which individuals received the “negligent
 18 misrepresentations” and who (if anyone) allegedly relied upon them. See Labrie v. UPS Supply
 19 Chain Solutions, Inc., Case No. C 08-3182 PJH, 2008 U.S. Dist. LEXIS 77637, *3 (N.D. Cal. Oct. 3,
 20 2008) (dismissing negligent misrepresentation claim where, as here, plaintiff did not allege the
 21 “individuals involved”). Based on the above, the Negligent Misrepresentation Claims must be
 22 dismissed.

23 **B. The Negligent Misrepresentation Claims Are Time-Barred**

24 The Negligent Misrepresentation Claims also are barred by the statute of limitations, which is
 25 six years under New York law¹⁵ and, at most, three years under Nevada law.¹⁶ Moreover, under

26 ¹⁵ See Certain Underwriters at Lloyd's, London v. William M. Mercer, Inc., 7 Misc.d 1008(A), 801
 27 N.Y.S.2d 231, 2005 NY Slip Op 50507(U), **12 (Sup. Ct., N.Y. Co. April 12, 2005). The 2005
 28 Credit Agreements provide that they are governed by New York law. See e.g., RJN, Ex. E (2005

(footnote continued next page)

New York law, the six year limitations period runs immediately from the time the challenged representation is made, and the limitations period is not tolled or extended, even where a party has not discovered that a wrong occurred. Certain Underwriters at Lloyd's, 2005 NY Slip Op 50507(U) at **35 (“[a] cause of action for negligent misrepresentation . . . [is] governed by a six-year statute of limitations, [and] the two-year discovery rule does not apply”). In Nevada, the limitations period runs from the time that a party either knew, or should have known, that a misrepresentation was made. Orr v. Bank of America, NT & SA, 285 F.3d 764, 780 (9th Cir. 2002) (under Nevada law, statute of limitations commences when the injured party knew or should have known of its claim).

Here, the gravamen of the Negligent Misrepresentation Claims appears to be that Credit Suisse fraudulently induced the Rhodes Entities and/or the “Rhodes Home enterprise” to allow Borrowers to enter into the 2005 Credit Agreements by virtue of the Rhodes Entities’ alleged receipt of (and reliance on) the 2005 C&W Total Net Value Appraisal prepared by Cushman & Wakefield ***over eight years ago***. (TPC ¶¶ 43, 60, 61, 65, 71, 72, 73.) The Rhodes Entities never allege how (or even that) the 2005 C&W Total Net Value Appraisal of which they now complain was misleading. Indeed, their only complaint appears to be that the 2005 C&W Total Net Value Appraisal was not a “market value appraisal.” (TPC, ¶ 44.) But, there is no allegation that Credit Suisse or anyone else led the Rhodes Entities to believe that the 2005 C&W Total Net Value Appraisal was anything but a “total net value” appraisal -- and, certainly not a “market value appraisal”. Indeed, the Rhodes

(footnote continued from previous page)

First Lien Credit Agreement), ¶ 9.15). As such, New York law governs the “substantive” merits of the Rhodes Entities’ claims. MRO Communications, Inc. v. American Telephone & Telegraph Company, 197 F.3d 1276, 1282 (9th Cir. 1999) (“[u]nder Nevada law, a choice-of-law provision in an agreement will be applied to ‘the substantive issues in a case’”) citing Tipton v. Heeren, 859 P.2d 465, 466 n.3 (Nev. 1993). The Court, however, need not decide any choice of law issues, as Credit Suisse cites both New York and Nevada law herein, with each requiring the dismissal of the Rhodes Entities’ claims.

¹⁶ In Nevada, Courts addressing negligent misrepresentation claims have applied either (i) a two year limitations period (Brant v. Shea Mortg., Inc., Case No. 2:10-CV-771 JCM (RJJ), 2010 U.S. Dist. LEXIS 80940, *4-5 (D. Nev. Aug. 6, 2010) citing N.R.S. § 11.190(4)(e); Kite v. Zimmer US, Inc., Case No. 2:06-CV-0745-RCJ (RJJ), 2006 U.S. Dist. LEXIS 85420, *13 (D. Nev. Nov. 21, 2006) (same)), or (ii) a three year limitation period pursuant to N.R.S. §11.190(3)(d) (Herold v. One West Bank, Case No. 2:10-CV-02204-KJD-GWF, 2011 U.S. Dist. LEXIS 112512, *5 (D. Nev. Sept. 29, 2011)).

Entities admit that they knew before Borrowers entered into the 2005 Credit Agreements that the 2005 C&W Total Net Value Appraisal (i) did not provide a present value discount, (ii) simply gave “an idea of the Project’s value”, and (iii) that Lenders would “perform for themselves whatever quantification and analysis they believed necessary to assess the risks and value of the loan, including determining the appropriate discount rate to apply to the Cushman & Wakefield projected cash flows.” (TPC, ¶ 43.) Given these allegations, the Rhodes Entities either knew or should have known in 2005 (and prior to entering into the 2005 Credit Agreements) that the 2005 C&W Total Net Value Appraisal was not a “market value appraisal”. As a result, under either New York or Nevada law, the Negligent Misrepresentation Claims are time-barred.¹⁷

C. The Rhodes Entities Fail To State Claims For Negligent Misrepresentation

“A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) [detrimental] reliance on the information.” J.A.O. Acquisition Corp. v. Stavitsky, 8 N.Y.3d 144, 148, 831 N.E.2d 364 (2007); Meyercord v. Curry, 38 A.D.3d 315, 316, 832 N.Y.S.2d 29 (1st Dep’t 2007). As set forth below, the Rhodes Entities fail to allege any of the requisite elements of a negligent misrepresentation claim.¹⁸

1. The Parties Did Not Have A “Special” or “Privity Like” Relationship

The Rhodes Entities fail to allege any facts establishing a “special” or “privity-like” relationship with Credit Suisse.

First, there was ***no*** relationship between the Rhodes Entities and Credit Suisse -- let alone a “special” or “privity-like” relationship necessary to maintain a negligent misrepresentation claim.

¹⁷ Assuming arguendo that the first cause of action sounds in negligence, such claim still would be time-barred. See Tenenbaum v. Gibbs, 27 A.D.3d 722, 723, 813 N.Y.S.2d 155 (2nd Dep’t 2006) (three-year limitations period applies to negligence claims); Kite v. Zimmer US, Inc., Case No. 2:06-CV-0745-RCJ (RJJ), 2006 U.S. Dist. LEXIS 85420 at *9 (D. Nev. Nov. 21, 2006) (same).

¹⁸ The negligence claim must meet the same requirements as the negligent misrepresentation claim because, as set forth above, both are based on misrepresentations. See Vanguard Mun. Bond Fund, Inc., 40 F. Supp. at 188; Williams 90 A.D. 2d at 862.

None of the Rhodes Entities was a party to the 2005 Credit Agreements, and the Rhodes Entities cannot claim that **any** relationship existed between them and Credit Suisse in the first instance. See, e.g., J.A.O Acquisition Corp., 8 N.Y.3d at 148.¹⁹

Second, “an arm’s length borrower-lender relationship is **not** of a confidential or fiduciary nature and therefore does not support a cause of action for negligent misrepresentation.” Dobroski v. Bank of Am., N.A., 65 A.D.3d 882, 884, 886 N.Y.S.2d 106 (1st Dep’t 2009) (emphasis added). Since no confidential relationship existed between Borrower and Credit Suisse, the Rhodes Entities (as equity holders of Borrowers) cannot claim any such relationship.

Third, where, as here, the parties to the 2005 Credit Agreements (and their equity holders) were sophisticated business entities dealing at arm’s length and on equal terms, there also is no basis to find the requisite “special” or “privity-like” relationship.²⁰ See Toledo Fund, LLC v. HSBC Bank USA, NA, No. 11 Civ. 7686, 2012 WL 364045 (S.D.N.Y. Feb 3, 2012) (“[i]n order for plaintiff to maintain claims for negligent misrepresentation or negligence, it must allege that there was a special relationship of trust and confidence between the parties. . . This relationship must be different from the arms-length, business relationship the parties had”).²¹ Moreover, the Rhodes Entities admit that

¹⁹ And, assuming that the first cause of action is one for negligence (which it is not), it still would fail as there is no allegation that a duty of care existed between the parties. Tenenbaum v. Gibbs, 27 A.D.3d 722, 723 (2nd Dep’t 2006) (dismissing negligence claim where bank did not owe a duty of care to borrower); see also Baymiller v. Ranbaxy Pharms., Inc., Case No. 3:11-cv-858-RCJ-VPC, 2012 U.S. Dist. LEXIS 127285, *23-24 (D. Nev. Sept. 6, 2012) (dismissing negligent misrepresentation claim where plaintiff could not establish any actionable duty); Kite v. Zimmer US, Inc., Case No. 2:06-CV-0745-RCJ (RJJ), 2006 U.S. Dist. LEXIS 85420, *9 (D. Nev. Nov. 21, 2006) (negligence claim must be based upon a duty of care).

²⁰ The Rhodes Entities admit that: (1) “over the course of the late 1990s and early 2000s, James Rhodes oversaw the operations of a ‘home-building enterprise doing business as “Rhodes Homes” in the areas around Las Vegas, Nevada”’, (2) the “enterprise consisted of various limited and general partnerships, limited liability companies, and joint ventures that operated to acquire, develop and improve land, to construct residential homes, and to sell property”’, (3) “[t]hroughout 2003 and 2004, the ‘Rhodes Homes’ enterprise rapidly increased its land holdings”’; and (4) “[t]hroughout 2005, the ‘Rhodes Homes’ enterprise continued to acquire land. According to the audited financial statements, the land holdings grew to more than \$273 million by December 31, 2005, consisting of \$66.7 million of ‘land held for development’ and \$207.05 million of ‘land held for investment’”. (Answer, ¶¶ 36, 39, 42 [Adv. Dkt. No. 176].)

²¹ See also MBIA Insurance Corp. v. Countrywide Home Loans, Inc., 87 A.D.3d 287, 296, 928 N.Y.S.2d 229 (1st Dep’t 2011) (requisite special relationship “does not arise out of an ordinary arm’s length business transaction between two parties”); Sebastian Holdings, Inc. v. Deutsche Bank AG, 78 A.D.3d 446, 447, 912 N.Y.S.2d 13 (1st Dep’t 2010) (dismissing negligent misrepresentation

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Borrowers downsized the amount of the credit facility originally offered to them, from \$600 million to \$500 million, since “the Rhodes Homes enterprise made the decision that a \$500 [million] secured credit facility . . . would be sufficient.” (TPC, ¶ 42.) Thus, there can be no dispute that Borrowers independently evaluated the loan and, consequently, there is no basis for them to claim that any “special” relationship existed between Borrowers and Credit Suisse, let alone between Credit Suisse and the Rhodes Entities.

2. The Rhodes Entities Do Not Identify Any Misrepresentation

As set forth above, the Rhodes Entities knew that the 2005 C&W Total Net Value Appraisal was not a “market value appraisal” before Borrowers entered into the 2005 Credit Agreement (TPC, ¶ 43). And, nowhere do the Rhodes Entities allege how the 2005 C&W Total Net Value Appraisal was incorrect or misrepresented anything. (*Id.*) As such, the Negligent Misrepresentation Claims fail. J.A.O. Acquisition Corp. v. Stavitsky, 8 N.Y. 3d at 148.

3. The Rhodes Entities Fail To Allege Detrimental Reliance

In order to state a claim for negligent misrepresentation, a plaintiff must “show both that [a] defendant’s misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and [b] that the misrepresentations directly caused the loss about which [the] plaintiff complains (loss causation).” Meyercord, 38 A.D.3d at 316.²² The Rhodes Entities, however, fail to establish the requisite detrimental reliance.

First, the Rhodes Entities fail to explain how Credit Suisse’s alleged conduct caused any harm. The crux of their claims appears to be that the 2005 C&W Total Net Value Appraisal (and

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claim where “parties engaged in arm’s-length transactions pursuant to contracts between sophisticated business entities that do not give rise to fiduciary duties”); see also Giles v. GMAC, 494 F. 3d 865, 881 (9th Cir. 2007) (quoting Hoopes v. Hammergren, 725 P. 2d 238, 242 (Nev. 1986)) (“[t]he essence of a...confidential relationship is that the parties do not deal on equal terms”).

²² See also Sciallo v. Tyco Intern. Ltd., 03 CIV 7770 (KBF), 2012 WL 2861340 at *6 (S.D.N.Y. July 9, 2012) (“loss causation is indeed an essential element of claims for [inter alia] negligent misrepresentation”) (emphasis added); First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 769 (2d Cir. 1994) (Plaintiff “must also show that the misstatements were the reason the transaction turned out to be a losing one”).

others prepared by Cushman & Wakefield) were not “market value appraisals.” (TPC, ¶¶ 34, 44-47.) But the Rhodes Entities do not (and cannot) explain how that “caused” any damages. Nor do the Rhodes Entities explain what “market value appraisals” would have reflected, and/or how the Rhodes Entities would have acted differently had such “market value appraisals” been provided.

Second, the Rhodes Entities “vehemently dispute” that entering into the 2005 Credit Agreements “‘left the Debtors’ [sic] over-leveraged and doomed to fail’”. (TPC, ¶ 3.) Instead, the Rhodes Entities claim that the “unprecedented (and unforeseen) collapse” of the national real estate and housing markets -- not any alleged misrepresentations -- was the cause of Borrowers’ inability “to fulfill their obligations under the terms of the \$500MM Credit Facility”, and their subsequent bankruptcy. (TPC, ¶¶ 3, 52, 53.) As such, the Rhodes Entities cannot sufficiently plead causation.²³

VII. THE EQUITABLE INDEMNITY CLAIM FAILS

The Rhodes Entities’ equitable indemnity claim seeks “complete and total indemnification by [Credit Suisse] from any liability of any kind that may be imposed upon the Rhodes Entities in connection with any litigation proceeding related to or arising out of [Credit Suisse’s allegedly] wrongful conduct.” (TPC, ¶ 85.) This claim fails for the following reasons.

First, as explained above, the Rhodes Entities fail to allege any duties owed to them pursuant to which Credit Suisse could be liable in the first instance. Nor do they explain how any of Credit Suisse’s allegedly “wrongful conduct” is related to the Litigation Trust’s decision to sue the Rhodes Entities for *their* breaches of *their* fiduciary duties and fraudulent conveyances.²⁴

²³ Lentell v. Merrill Lynch & Co., Inc., 396 F. 3d 161, 174 (2d Cir. 2005) (“‘[w]hen the plaintiff’s loss coincides with a marketwide phenomenon causing comparable losses to other investors, the prospect that the plaintiff’s loss was caused by the fraud decreases’, and a plaintiff’s claim fails when ‘it has not adequately [identified] facts which, if proven, would show that its loss was caused by the alleged misstatements as opposed to intervening events’”); see also In re QLT Inc. Securities Lit., 312 F. Supp. 2d 526, 536 (S.D.N.Y. 2004) (where “an intervening cause supersedes the effects of an initial misrepresentation,” loss causation cannot be shown).

²⁴ Moreover, to the extent the Rhodes Entities allege that Credit Suisse (as a member of the Litigation Trust Advisory Board) “directed” the Litigation Trust to file the Litigation Trust Complaint (TPC, ¶¶ 57, 58, 94), any such conduct was released pursuant to the exculpation provisions contained in the Plan. See RJN, Ex. D (Plan), § VIII. G. (“no Exculpated Party [which includes Credit Suisse as Agent and First Lien Lender] shall have or incur, and each Exculpated Party is hereby released and exculpated from any Claim, obligation, Cause of Action, or liability to one another, or to any Exculpating Party for any Exculpated Party for any Exculpated Claim, except

(footnote continued next page)

Second, the equitable indemnity claim is premised on a finding that the Rhodes Entities engaged in wrongful conduct (TPC, ¶¶ 55, 85) -- which finding precludes equitable indemnity. See County of Westchester v. Welton Becket Associates, 102 A.D.2d 34, 46-47, 478 N.Y.S.2d 305 (2nd Dep’t 1984) (equitable indemnity claim exists only “[w]here one *who has committed no actual wrong* is held vicariously liable for the wrongdoing of another,” and seeks to recoup any damages assessed against him from the party who actually committed the wrong) (emphasis added); William L. Crow Constr. Co. v. Quickway Metal Fabricators, Inc., 155 A.D.2d 295, 547 N.Y.S.2d 59, 60 (1st Dep’t 1989) (a party that participates “to some degree in the wrongdoing... cannot receive the benefit of the implied indemnification doctrine”); Rodriguez v. Primadonna Co., LLC, 216 P.3d 793, 801 (Nev. 2009) (finding that “implied indemnity is an equitable remedy...to address the unfairness which results when one party, who has committed no independent wrong, is held liable for the loss of a plaintiff caused by another party”) (emphasis added.) Thus, this claim must be dismissed as well.

VIII. THE RHODES ENTITIES FAIL TO STATE A CLAIM FOR CONTRIBUTION

“Contribution involves an apportionment of responsibility where wrongdoers are *in pari delicto*...[and] [e]ach of the wrongdoers owes a duty to the injured party”. County of Westchester, 102 A.D.2d at 46-47; see also Clark County Sch. Dist. v. Richardson Constr., Inc., 168 P.3d 87, 91 n.4 (Nev. 2007) (“contribution is a method of apportioning damages among joint tortfeasors”). Thus, “[a] party seeking contribution must show that the party from whom contribution is sought owes a duty either to him or to the injured party and that a breach of this duty has contributed to the alleged injuries[.]” Crimi v. Black, 219 A.D.2d 610, 611, 631 N.Y.S.2d 387 (2nd Dep’t 1995) (dismissing contribution claim where, as here, no breach of duty occurred).

However, and as discussed above, the Rhodes Entities fail to identify any purported duties between Credit Suisse and any other party that was breached, let alone a tort that Credit Suisse committed, and, instead, restate the allegations of the Negligent Misrepresentation Claims -- which

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for gross negligence, willful misconduct or fraud”).

are defective as explained in Section VI.C, above. Accordingly, the contribution claim also must be dismissed.

IX. THE BREACH OF CONTRACT CLAIM FAILS

A. The Rhodes Entities Are Not Third Party Beneficiaries To The Agreements

The breach of contract claim must be dismissed because, among other things, it is based upon the faulty premise that the Rhodes Entities are third-party beneficiaries under the 2005 Credit Agreements. (TPC, ¶ 93.) “In order for a contract to confer enforceable third-party beneficiary rights... the contract language should otherwise clearly evidence ‘an intent to permit enforcement by the third party.’”²⁵ Here, the opposite is true, as the plain language of 2005 Credit Agreements establish that the Rhodes Entities are *not* intended third party beneficiaries. Indeed, the 2005 Credit Agreements expressly state that they shall only “inure to the benefit *of the parties hereto* and the successors and assigns *of the Lenders*” and that “neither the Borrowers’ rights or obligations hereunder nor any interest therein may be assigned or delegated by any Borrower without the prior written consent of all Lenders.” (RJN, Ex. E (2005 First Lien Credit Agreement) § 9.16) (emphasis added).

Courts have routinely held that the inclusion in an agreement of a provision such as that contained in Section 9.16 defeats any third-party beneficiary claim. See Martinez v. Bank of Am. Nat’l Ass’n, Case No. 3:10-cv-00287-RCJ-RAM, 2010 U.S. Dist. LEXIS 113378, *27 (D. Nev. Oct. 20, 2010) (provision virtually identical to Section 9.16 precluded plaintiffs from asserting third-party beneficiary status); Mid-Valley Oil Company, Inc. v. Hughes Network Systems, Inc., 54 A.D. 3d 394, 396, 863 N.Y.S.2d 244 (2nd Dep’t 2008) (third-party beneficiary claim failed where, as here, plaintiff could not establish that the agreement was intended to “inure to [its] benefit”); United Int’l Holdings v. Wharf Ltd., 988 F. Supp. 367, 373 (S.D.N.Y. 1997) (“[n]on-assignability clauses have

²⁵ See also Artwear, Inc. v. Hughes, 202 A.D.2d 76, 82, 615 N.Y.S.2d 689 (1st Dep’t 1994); R&O Constr. Co. v. Rox Pro Int’l Group, Ltd., Case No. 2:09-cv-01749-LRH-LRL, 2011 U.S. Dist. LEXIS 131633 at *8 (D. Nev. Nov. 14, 2011) (“there must be a clear intent in the contract for a benefit to be conferred upon a third-party before a court may recognize a third-party beneficiary of a contract”); Olson v. Iacometti, 533 P.2d 1360, 1364 (Nev. 1975) (a non-party to a contract must prove that it is for his direct benefit before exercising the “exceptional privilege” of suing on it).

1 been held to negate third-party beneficiary status, even where assignment was permitted with prior
2 written approval”).

3 Thus, under both New York and Nevada law, the Rhodes Entities cannot establish that they
4 have any third-party beneficiary rights, and their claim should be dismissed.²⁶

5 **B. The Litigation Complaint Does Not Constitute A Breach Of Contract**

6 There is no basis for the Rhodes Entities to argue that the *Litigation Trust’s* pursuit of
7 litigation constitutes any breach by Credit Suisse of the 2005 Credit Facility Agreements. This is
8 because Credit Suisse did not file any lawsuit against the Rhodes Entities.²⁷

9 In addition, the Rhodes Entities’ breach of contract claim rests on the assertion that the
10 Litigation Trust Complaint seeks to obtain amounts “in order to repay Credit Suisse and Lenders”
11 for “their allowed bankruptcy claims for the unpaid portion of the loans of the \$500MM Credit
12 Facility” and, as such, violates the non-recourse provisions of Section 9.21 of the 2005 Credit
13 Agreements (TPC, ¶¶ 92, 94, 95.)²⁸ This assertion is wrong.

14 Section 9.21 applies only to “liab[ility]” for “Obligations,” which is defined as “all
15 obligations of every nature of each Loan Party from time to time owed to the Agents, the Lenders or
16 any of them or their respective Affiliates under the Loan Documents, or, if approved by the
17 Administrative Agent, Specified Hedge Agreements, whether for principal, interest . . . or payments
18 for early termination of Specified Hedge Agreements, fees, expenses, indemnification or otherwise.”
19

20 ²⁶ Moreover, the only third-party defendant who is a party to the 2005 Credit Agreements is Credit
21 Suisse AG, Cayman Islands Branch. (TPC, ¶ 47; RJN, Ex. E (2005 First Lien Credit Agreement).
22 The Rhodes Entities do not (and cannot) allege any basis to hold Credit Suisse Securities (USA)
23 LLC, Credit Suisse Holdings (USA) Inc., Credit Suisse (USA), Inc., and Credit Suisse AG, New
York Branch liable for breach of contract and such claim must be dismissed for this additional
reason.

24 ²⁷ And, as set forth above, to the extent the Rhodes Entities contend that Credit Suisse “directed” the
filing of the Litigation Trust Complaint, such conduct was released pursuant to the exculpation
provisions of the Plan.

25 ²⁸ Section 9.21 provides: “NOTWITHSTANDING ANYTHING IN ANY OF THE LOAN
26 DOCUMENTS TO THE CONTRARY, NO PARTNER, MEMBER, SHAREHOLDER OR OTHER
27 BENEFICIAL OWNER OF THE BORROWERS (OTHER THAN THE LOAN PARTY) SHALL
BE LIABLE FOR THE PAYMENT OR PERFORMANCE OF THE OBLIGATIONS.” (RJN,
28 Ex. E (First Lien Credit Agreement), ¶ 9.21.)

(RJN, Ex. E (First Lien Credit Agreement), § 1.1, pp. 19-20.) The Litigation Trust does not seek recovery or payment of any “Obligations,” as defined in the 2005 Credit Agreements.²⁹ Instead, as described above, the Litigation Trust seeks to hold the Rhodes Entities liable for breaches of fiduciary duty, fraudulent transfers, avoidance actions, and other misconduct -- all of which are separate and distinct from the failure of any Borrowers to satisfy “Obligations” to the Lenders. Such tortious conduct has nothing to do with Section 9.21 and the non-recourse provisions contained therein. See, e.g., Bank of New York v. Berisford Int’l P.L.C., 190 A.D.2d 622, 623, 594 N.Y.S.2d 152 (1st Dep’t 1993) (“causes of action...concern tort claims and seek tort damages, the ‘non-recourse’ language of the notes and mortgage is not relevant to [such] claims”).³⁰ Accordingly, there is no basis for the breach of contract claim.

X. CONCLUSION

For all of the foregoing reasons, Credit Suisse respectfully requests that the Court grant the Motion to Dismiss the Third-Party Complaint without leave to amend.

Dated: April 8, 2013

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²⁹ TPC, ¶ 55; (“[t]he [Litigation Trust] filed an adversary action against the Rhodes Entities...[which] alleges that distributions made to the Rhodes Entities were fraudulent conveyances and seeks to recover the entirety of the distributions”).

³⁰ Plaza Bank v. Alan Green Family Trust, Case No. 2:11-cv-130-RCJ-RJJ, 2011 U.S. Dist. LEXIS 82802, *23 (D. Nev. Jul. 26, 2011) (“an action for fraudulent conveyance is akin to a tort”); Atsco Ltd. v. Swanson, 29 A.D.3d 465, 465, 816 N.Y.S.2d 31 (1st Dep’t 2006) (referencing the “tort of fraudulent conveyance”).

Exhibit 1

EXHIBIT 1

First Cause of Action	Second Cause of Action
59. Third-Party Plaintiffs incorporate as if fully set forth here the facts and allegations previously and hereafter set forth in this Third-Party Complaint.	70. Identical
60. Third-Party Defendants furnished written and oral information to Third-Party Plaintiffs. Third-Party Defendants prepared these documents and made these representations (including but not limited to the Total Net Value appraisals) with specific knowledge and intent that said documents would be distributed to Third-Party Plaintiffs in order to induce them to enter into the aforesaid Credit Facility Agreements and resulting \$500MM Credit Facility. Third-Party Plaintiffs were foreseeable recipients of said representations, and Third-Party Defendants knew and intended that they would rely on the Third-Party Defendants' representations, which Third-Party Defendants knew or should have known were false and misleading.	72. Third-Party Defendants furnished written and oral information to Third-Party Plaintiffs. Third-Party Defendants prepared these documents and made these representations (including but not limited to the Total Net Value appraisals) with specific knowledge and intent that said documents would be distributed to Third-Party Plaintiffs, in order to induce them <u>the Rhodes Homes enterprise to allow the Borrowers</u> to enter into the aforesaid Credit Facility Agreements and resulting \$500MM Credit Facility . Third-Party Plaintiffs were foreseeable recipients of said representations, and Third-Party Defendants knew <u>or should have known</u> and intended that they would rely on the Third-Party Defendants' representations, which Third-Party Defendants knew or should have known were false and misleading.
61. In connection with their respective proper business purposes in which they were lawfully engaged, Third-Party Plaintiffs received the appraisal and other written and oral presentations from Third-Party Defendants before entering into the financial transaction with Third-Party Defendants. Third-Party Plaintiffs also received the oral misstatements from the Third-Party Defendants, and were subject to the aforementioned materially misleading omissions of the Third-Party Defendants, in connection with said business purposes.	73. Identical
62. Third-Party Defendants each had a duty to provide Third-Party Plaintiffs with materially accurate information and disclosures, and each Third-Party Defendant had a duty to refrain from misrepresenting the terms of or the basis for the said loans and Credit Facility Agreements. In violation of that duty, each Third-Party Defendant failed to exercise reasonable care in connection with the aforesaid transactions, appraisals, and the preparation, presentation, publication, and	74. Identical

First Cause of Action	Second Cause of Action
communication thereof to foreseeable users of said information.	
63. Third-Party Defendants failed to exercise reasonable care in making the oral and written presentations to the Third-Party Plaintiffs.	75. Identical
64. Third-Party Defendants had a substantial pecuniary interest in the completion of the aforesaid loans, and stood to receive substantial personal gain if the loan transaction was executed.	76. Identical
65. Third-Party Defendants' aforesaid untrue statements and failures to disclose material facts related to matters of importance or significance to the decisions of the Third-Party Plaintiffs as to whether to enter into the said loan transaction with Third-Party Defendants, and caused them to accept Third-Party Defendants' proffered loan agreements, which caused harm and substantial economic damages to the Third-Party Plaintiffs.	77. Third-Party Defendants' aforesaid untrue statements and failures to disclose material facts related to matters of importance or significance to the decisions of the Third-Party Plaintiffs as to whether to <u>the Borrowers should</u> enter into the said loan transaction with Third-Party Defendants, and caused them to accept Third-Party Defendants' proffered loan agreements, which caused harm and substantial economic damages to the Third-Party Plaintiffs.
66. The acts, omissions and conduct aforesaid of Third-Party Defendants, and each them, amounted to the commission of negligence.	78. Identical
67. As a direct and proximate result of the Third-Party Defendants' breach of their duty and failure to exercise reasonable care, Third-Party Plaintiffs were caused, and continue to suffer, economic damages in an amount far in excess of \$75,000 dollars to be proven at trial.	80. As a direct and proximate result of the Third-Party Defendants' breach of their duty and failure to exercise reasonable <u>care misrepresentations</u> , Third-Party Plaintiffs were caused, and continue to suffer, economic damages in an amount far in excess of \$75,000 dollars to be proven at trial.
68. Each of the Third-Party Defendants are jointly and severally liable to Third-Party Plaintiffs for their damages by virtue of their having collaborated in establishing, promoting and, implementing the Total Net Value scheme.	81. Identical
69. Third-Party Plaintiffs are lawfully entitled to recover from the Defendants all of the economic damages that were caused them by the Third-Party Defendants' negligence and/or negligent misrepresentations and omissions of the facts pertinent to the aforesaid loan transaction and Credit Agreement, the amount of which damages will be proven at trial and which exceed \$75,000 dollars.	82. Third-Party Plaintiffs are lawfully entitled to recover from the <u>Third-Party</u> Defendants all of the economic damages that were caused them by the Third-Party Defendants' negligence and/or negligent misrepresentations and omissions of the facts pertinent to the aforesaid loan transaction and Credit Agreement, the amount of which damages will be proven at trial and which <u>far</u> exceed \$75,000 dollars.

CERTIFICATE OF SERVICE

1. On April 8, 2013, I served the foregoing document, **MOTION OF CREDIT SUISSE AG, CAYMAN ISLANDS BRANCH; CREDIT SUISSE SECURITIES (USA) LLC; CREDIT SUISSE HOLDINGS (USA), INC.; CREDIT SUISSE (USA), INC.; AND CREDIT SUISSE AG, NEW YORK BRANCH TO DISMISS RHODES ENTITIES' THIRD-PARTY COMPLAINT**

2. I served the above-named document(s) by the following means to the persons as listed below:

X a. **ECF SYSTEM** (You must attach the "Notice of Electronic Filing" or list all persons and addresses and attach additional paper if necessary):

- JUSTIN L. CARLEY jcarley@swlaw.com, jforrest@swlaw.com;DOCKET_LAS@swlaw.com
- CAROL L. HARRIS c.harris@kempjones.com, ade@kempjones.com;srd@kempjones.com
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I declare under penalty of perjury that the foregoing is true and correct.

DATED this 8th day of April, 2013

Heather Dooley Nugget
Name

/s/ Heather Dooley Nugget
Signature

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re

 THE RHODES COMPANIES, LLC, aka
 "Rhodes Homes," et al.,

 Reorganized Debtors.

Case No. 09-14814-LBR
 Chapter 11

THE LITIGATION TRUST OF THE RHODES
 COMPANIES, LLC, et al.,

Adv. No. 12-01099-LBR

Plaintiff,

**MOTION TO DISMISS UNDER RULE
 12(b) OF THE FEDERAL RULES OF
 CIVIL PROCEDURE AND
 MEMORANDUM OF LAW**

v.

JAMES M. RHODES; ET AL.,

 Defendants.

Date of Hearing: June 10, 2013
 Time of Hearing: 10:00 a.m.
 Place: Courtroom No. 1, Third Floor
 Foley Federal Building
 300 Las Vegas Blvd., S.
 Las Vegas, NV 89101

JAMES M. RHODES, SAGEBRUSH
 ENTERPRISES, INC., JOHN C. RHODES,
 TRUSTEE OF THE JAMES M. RHODES
 DYNASTY TRUST I, JOHN C. RHODES,
 TRUSTEE OF THE JAMES M. RHODES
 DYNASTY TRUST II, and RHODES RANCH,
 LLC,

Judge: Hon. Linda B. Riegler

Third-Party Plaintiffs,

1 v.

2 CREDIT SUISSE AG, a Swiss corporation; ET
3 AL.,

4 Third-Party Defendants.

5 **MOTION TO DISMISS UNDER RULE 12(b) OF THE FEDERAL RULES OF CIVIL**
6 **PROCEDURE AND MEMORANDUM OF LAW**

7 Third-Party Defendants CUSHMAN & WAKEFIELD, INC. ("CW"), CUSHMAN &
8 WAKEFIELD OF TEXAS, INC. ("CW-TX"), and CUSHMAN & WAKEFIELD OF NEVADA,
9 INC. ("CW-NV") (collectively, the "Cushman Entities"), by and through counsel, Beirne,
10 Maynard & Parsons, L.L.P. and Cotton, Driggs, Walch, Holley, Woloson & Thompson, hereby
11 file their Motion to Dismiss under Rule 12(b) of the Federal Rules of Civil Procedure and
12 Memorandum of Law in support thereof (the "Motion to Dismiss"), pursuant to Rule 7012 of the
13 Federal Rules of Bankruptcy Procedure.

14 **RESERVATION AND PRELIMINARY STATEMENT**

15 The Cushman Entities do not consent to the entry of any final orders or judgments by the
16 Bankruptcy Court concerning the non-core, state law claims alleged in the Third-Party
17 Complaint. The Cushman Entities state that all matters alleged in the Third-Party Complaint
18 against the Cushman Entities are non-core, state law claims. Subject to and without waiving their
19 Motion to Dismiss, CW-TX and CW-NV are also separately submitting their Demand for Jury
20 Trial demanding a jury trial on all issues on which they are entitled under the Seventh
21 Amendment to the U.S. Constitution.

22 **RELEVANT PROCEDURAL FACTS**

23 1. On either March 31, 2009 and April 1, 2009 (collectively, the "Filing Date"), each
24 of the above-captioned debtors (collectively, the "Debtors") filed voluntary petitions under
Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

25 2. On February 18, 2010, the First Lien Steering Committee filed a Third Amended
26 Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code for The Rhodes
27 Companies, LLC, et. al. (the "Third Amended Plan"). (See Third Amended Plan [Doc. 1013,
28 Case No. 09-14814-LBR] dated February 18, 2010) The Third Amended Plan established the

1 Litigation Trust of The Rhodes Companies, LLC et al. (the “Litigation Trust”) to “enforce all
2 rights to commence and pursue, as appropriate, any and all Causes of Action, whether arising
3 before or after the Petition Date.” (See Third Amended Plan [Doc. 1013, Case No. 09-14814-
4 LBR] at p. 36 of 72, Article IV.P.)

5 3. On March 19, 2010, the Bankruptcy Court entered an Order Confirming the Third
6 Amended Plan (the “Confirmation Order”). (See Confirmation Order [Doc. 1060, Case No. 09-
7 14814-LBR] dated March 19, 2010.) The Confirmation Order states that the Third Amended
8 Plan was substantially consummated on the “Effective Date.” (*Id.* at p. 18 of 120, ¶ 31.)

9 4. On May 11, 2012, the Litigation Trust commenced this adversary proceeding by
10 filing its Original Complaint (the “Original Complaint”) against the above-captioned defendants.
11 (See Original Complaint [Doc. 1, Case No. 12-01099-LBR] dated May 11, 2012.)

12 5. On January 25, 2013, the above-captioned Third-Party Plaintiffs (collectively,
13 “Third-Party Plaintiffs”) filed their Third-Party Complaint and Demand for Jury Trial (the
14 “Third-Party Complaint”) against the Cushman Entities, and numerous entities related to Credit
15 Suisse AG (collectively, the “Credit Suisse Entities”). (See Third-Party Complaint [Doc. 178,
16 Case No. 12-01099-LBR] dated January 25, 2013.)

17 6. The Third-Party Complaint asserts limited causes of action against the Cushman
18 Entities: negligence-based claims and equitable indemnity and contribution claims. All causes of
19 action asserted against the Cushman Entities, however, are non-core, state law claims that do not
20 arise from or relate to the Debtors’ Chapter 11 case.

21 MOTION TO DISMISS

22 The Third-Party Complaint is pled entirely in the alternative. It alleges that the Third-
23 Party Plaintiffs, consisting of persons and entities affiliated with the Debtors and the developers
24 of a master planned resort community known as Rhodes Ranch in Las Vegas, Nevada, may be
25 subject to liability as a result of the pending claims of the Litigation Trust alleging that
26 distributions of loan proceeds were improperly diverted or fraudulently conveyed to the Third-
27 Party Plaintiffs and others. Third-Party Plaintiffs allege, as to the Cushman Entities, that the
28 Cushman Entities were negligent in providing a “total net value” appraisal of Rhodes Ranch as

requested by Credit Suisse. Third-Party Plaintiffs also allege that they were allegedly induced by Credit Suisse into believing that the loan was “collateralized by equity based real estate ‘appraisals’ in conformity with traditional banking industry standards.”

The Third-Party Complaint should be dismissed for one or more of the following reasons: (1) under Rule 12(b)(1) since no subject matter jurisdiction exists over any of the non-core, state law claims alleged against the Cushman Entities since such claims are not related to or arising under the Debtors’ chapter 11 case; (2) under Rule 12(b)(2) as to CW since no personal jurisdiction exists over CW due to an absence of facts supporting either the exercise of specific or general jurisdiction in Nevada as the forum state; (3) under Rule 12(b)(6) since the Third-Party Complaint fails to state a viable negligence-based claim against the Cushman Entities because it is time barred under the applicable statute of limitations; and (4) under Rule 12(b)(6) because the Third-Party Complaint fails to state a viable claim for equitable indemnity as a matter of law. Pleading in the alternative, to the extent necessary, under Rule 12(e) under the Federal Rules of Civil Procedure, Third-Party Plaintiffs should be required to re-plead against each of the Cushman Entities to avoid any prejudice caused by the currently vague and ambiguous Third-Party Complaint.

MEMORANDUM OF LAW

1. **LACK OF SUBJECT MATTER JURISDICTION OVER THE CUSHMAN ENTITIES.**

The Third-Party Complaint must be dismissed in its entirety because this Court lacks subject matter jurisdiction over the claims asserted against the Cushman Entities.

A. Rule 12(b)(1) Standard.

Federal Rule of Civil Procedure 12(b)(1) provides that a court may dismiss a claim for lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). Although the defendant is the moving party in a motion to dismiss, the plaintiff is the party invoking the court’s jurisdiction. As a result, a plaintiff bears the burden of proving that the case is properly in federal court. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001) (citing *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In addressing a motion to dismiss for lack

of subject matter jurisdiction, a district court may consider evidence outside the pleadings. *See Farr v. United States*, 990 F.2d 451 (9th Cir. 1993).

B. Jurisdiction of the Bankruptcy Courts.

“The jurisdiction of the bankruptcy courts, like that of other courts, is grounded in and limited by statute.” *In re Casamont Investors, Ltd.*, 196 B.R. 517, 521 (9th Cir. BAP 1996) (citing *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S.Ct. 1493, 1498, 131 L.Ed.2d 403 (1995)). Subsection (a) of 28 U.S.C. § 157 provides that a district court “may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judge for the district.” Similarly, 28 U.S.C. § 1334 allows a district court to abstain from hearing a proceeding “arising under title 11, or arising in or related to cases under title 11.”

C. The Non-Core, State Law Claims of the Third-Party Complaint.

The bankruptcy court is required to determine, *sua sponte* or on timely motion of a party, whether the proceeding is either “core” or “non-core.” *See* 28 U.S.C. § 157(b)(3). “Core proceedings are actions by or against the debtor that arise under the Bankruptcy Code in the strong sense that the Code itself is the source of the claimant’s right or remedy, rather than just the procedural vehicle for the assertion of a right covered by some other body of law, normally state law.” *In re Professional Satellite and Communication, LLC*, No. 12-cv-70-L (MDD), 2012 WL 6012829, at *2 (S.D. Cal. Dec. 3 2012) (citing *Matter of U.S. Brass Corp.*, 110 F.3d 1261, 1268 (7th Cir. 1997)). Nonexclusive examples of “core proceedings” include matters concerning the administration of the estate, allowance and disallowance of claims, counterclaims by the estate against persons filing claims against the estate, proceedings to recover preferences and fraudulent transfers, and a litany of other matters not implicated here. *See* 28 U.S.C. § 157(b)(2). By contrast, the Ninth Circuit has held that “a proceeding is non-core if they do not depend on the Bankruptcy Code for their existence and they could proceed in another court.” *Dunmore v. US*, 358 F.3d 1107, 1114 (9th Cir. 2004).

The current claims for negligence, equitable indemnity, and contribution against the Cushman Entities are undeniably non-core. These claims, which the Cushman Entities deny,

1 involve common-law causes of action arising out of allegations that the Cushman Entities were
 2 purportedly negligent in providing a “total net value” appraisal of Rhodes Ranch as requested by
 3 Credit Suisse. These non-core, state law claims involve private rights and do not depend on the
 4 Bankruptcy Code for their existence.

5 Thus, the question turns to whether the non-core, state law claims in the Third-Party
 6 Complaint arise in or relate to a case under title 11 of the Bankruptcy Code or the underlying
 7 bankruptcy case. A matter “arises under” the Bankruptcy Code if its existence depends on a
 8 substantive provision of bankruptcy law – that is, if it involves a cause of action created or
 9 determined by a statutory provision of the Bankruptcy Code. *In re Harris*, 590 F.3d 730, 737
 10 (9th Cir. 2009); *In re Eastport Assocs.*, 935 F.2d 1071, 1076 (9th Cir.1991) (citing *In re Wood*,
 11 825 F.2d 90, 96 (5th Cir. 1987)). A proceeding “arises in” a case under the Bankruptcy Code if it
 12 is an administrative matter unique to the bankruptcy process that has no independent existence
 13 outside of bankruptcy and could not be brought in another forum, but whose cause of action is
 14 not expressly rooted in the Bankruptcy Code. *See In re Marshall*, 600 F.3d 1037, 1054-55 (9th
 15 Cir. 2010).

16 If it is a “non-core” proceeding, the bankruptcy court must then determine if it is “related
 17 to” a case under the bankruptcy code. *Id.* Adopting the definition of “related to” articulated by
 18 the Third Circuit, the Ninth Circuit stated:

19 The usual articulation of the test for determining whether a civil
 20 proceeding is related to bankruptcy is whether *the outcome of the*
 21 *proceeding could conceivably have any effect on the estate being*
 22 *administered in bankruptcy.* [citations omitted]. Thus, the
 23 proceeding need not necessarily be against the debtor or against the
 24 debtor's property. An action is related to bankruptcy if the outcome
 could alter the debtor's rights, liabilities, options, or freedom of
 action (either positively or negatively) and which in any way
 impacts upon the handling and administration of the bankrupt
 estate.

25 *See In re Fietz*, 852 F.2d 455, 457 (9th Cir. 1988) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984,
 26 994 (3d Cir. 1984)). Furthermore, post-confirmation jurisdiction is much more limited than pre-
 27 confirmation jurisdiction. In post-confirmation situations, there must be a “close nexus” to the
 28

1 bankruptcy case for post-confirmation “related to” jurisdiction. *See In re Pegasus Gold Corp.*,
2 394 F.3d 1189, 1193-94 (9th Cir. 2005).

3 Here, the claims against the Cushman Entities are state law claims based on allegations
4 independent of the bankruptcy case. They do not “arise under” the Bankruptcy Code.
5 Furthermore, these state law claims do not depend on an administrative matter unique to the
6 bankruptcy process. The current claims could be brought in another forum and, therefore, they
7 do not “arise in” a case under the Bankruptcy Code.

8 The resolution of the state law claims asserted against the Cushman Entities, which are
9 unrelated to the underlying bankruptcy case, will not have any effect on the bankruptcy estate. In
10 fact, the reorganization plan was already confirmed well *before* the Third-Party Complaint was
11 filed. Thus, there is no conceivable relationship between the outcome of the Third-Party
12 Complaint and the administration of the bankruptcy estate. *See In re Fietz*, 852 F.2d at 458.

13 Finally, CW-TX and CW-NV have demanded a jury trial, subject to its jurisdictional
14 challenges, and do not consent to entry of final orders or judgments by the bankruptcy court. *See*
15 *Stern v. Marshall*, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011). Under *Stern*, therefore, the
16 Bankruptcy Court lacks the constitutional authority to adjudicate the claims against the Cushman
17 Entities absent consent since such claims involve “private rights” as opposed to public rights
18 created by the bankruptcy laws.

19 In sum, the Court does not have subject matter jurisdiction. There is also no separate
20 basis for subject matter jurisdiction in the district court over these state law claims since there is
21 no diversity or federal question jurisdiction. Accordingly, Third-Party Defendants CW, CW-TX,
22 and CW-NV move this Court to dismiss all claims of the Third-Party Plaintiffs for lack of
23 subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure
24 applicable to bankruptcy cases under Rule 7012 of the Federal Rules of Bankruptcy Procedure.

25
26 **2. LACK OF PERSONAL JURISDICTION OVER CUSHMAN &
WAKEFIELD, INC.**

27 The Third-Party Complaint must be dismissed as to CW because this Court lacks
28 personal jurisdiction over CW.

1 **A. Rule 12(b)(2) Standard.**

2 Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, a defendant may move to
3 dismiss an action for lack of personal jurisdiction. “Where a defendant moves to dismiss a
4 complaint for lack of personal jurisdiction, the plaintiff bears the burden of demonstrating that
5 jurisdiction is appropriate.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th
6 Cir. 2004). A court may consider evidence presented in affidavits to assist in its determination.
7 *See Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). The court
8 must analyze whether personal jurisdiction exists over each defendant separately. *See Harris*
9 *Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1130 (9th Cir. 2003).

10 The Ninth Circuit follows a two-step test to determine the propriety of asserting personal
11 jurisdiction over an out-of-state defendant. The plaintiff must first demonstrate that (1) personal
12 jurisdiction is permitted under the applicable state’s long-arm statute; and (2) the exercise of
13 personal jurisdiction does not violate federal due process. *See Pebble Beach Co. v. Caddy*, 453
14 F.3d 1151, 1154 (9th Cir.2006). Where a forum state’s long-arm statute provides its courts
15 jurisdiction to the fullest extent of the Due Process Clause of the Fourteenth Amendment, such as
16 in Nevada, *see Arbella Mut. Ins. Co. v. Eighth Judicial Dist. Court*, 134 P.3d 710, 712
17 (Nev.2006) (citing NEV. REV. STAT. § 14.065), a court need only apply federal due process
18 standards, *see Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008).

19 There are two types of personal jurisdiction that a court may have over a non-resident
20 defendant: general jurisdiction and specific jurisdiction. *See Helicopteros Nacionales de*
21 *Columbia, S.A. v. Hall*, 466 U.S. 408, 414–15 (1984); *see also Reebok Int’l Ltd. v. McLaughlin*,
22 49 F.3d 1387, 1389 (9th Cir. 1995).

23 **B. General Jurisdiction.**

24 A court may exercise general jurisdiction only if the non-resident defendant’s contacts
25 with the forum state are purposeful and “continuous and systematic.” *Helicopteros*, 466 U.S. at
26 414–16. It is not necessary that the specific cause of action alleged be connected with the
27 defendant’s business relationship to the forum because “[g]eneral jurisdiction provides for
28 jurisdiction without consideration of the claim asserted, if a defendant’s activities in the forum

1 state can fairly be characterized as ‘continuous and systematic.’ ” *Graziose v. American Home*
 2 *Products Corp.*, 161 F. Supp. 2d 1149, 1152 (D. Nev. 2001) (citing *Helicopteros*, 466 U.S. at
 3 414). “Factors to be taken into consideration are whether the defendant makes sales, solicits or
 4 engages in business in the state, serves the state’s markets, designates an agent for service of
 5 process, holds a license, or is incorporated there.” *Bancroft & Masters, Inc. v. Augusta Nat’l,*
 6 *Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000).

7 **C. Specific Jurisdiction.**

8 Specific jurisdiction exists when there are sufficient minimal contacts with the forum
 9 state such that assertion of personal jurisdiction “does not offend ‘traditional notions of fair play
 10 and substantial justice.’ ” *Int’l Shoe Co. v. State of Wash., Office of Unemployment Comp. &*
 11 *Placement*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). The
 12 Ninth Circuit has developed a three-part test for specific jurisdiction:

- 13 (1) the non-resident defendant must purposefully direct his activities or consummate
 14 some transaction with the forum or resident thereof; or perform some act by
 15 which he purposefully avails himself of the privilege of conducting activities in
 16 the forum thereby invoking the benefits and protections of its laws;
- 17 (2) the claim must be one which arises out of or relates to the defendant’s forum-
 18 related activities; and
- 19 (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e.
 20 it must be reasonable.

21 *Boschetto*, 539 F.3d at 1016 (quoting *Schwarzenegger*, 374 F.3d at 802). “The plaintiff bears the
 22 burden of satisfying the first [two] prongs of the test. If the plaintiff fails to satisfy either of these
 23 prongs, personal jurisdiction is not established in the forum state.” *See Schwarzenegger*, 374
 24 F.3d at 800.

25 **D. Jurisdictional Allegations in the Third-Party Complaint.**

26 In this case, Third-Party Plaintiffs bear the burden of establishing the district court’s
 27 personal jurisdiction over Cushman & Wakefield, Inc. (“CW”). *Harris Rutsky & Co.*, 328 F.3d at
 28 1128–29. The Third-Party Complaint correctly alleges that CW is “a privately held New York

1 corporation with its principal place of business in New York.” (Third-Party Complaint, Doc.
2 178, at p. 5, ¶ 11.). Thereafter, Third-Party Plaintiffs’ jurisdictional allegations are limited to
3 subject-matter jurisdiction and, undeniably, fall far short of satisfying the burden of pleading
4 personal jurisdiction over CW. Indeed, this burden cannot be factually satisfied.

5 CW does not have the requisite degree of minimum contacts. CW does not have offices
6 in Nevada; it has not done business in Nevada; it owns no property in Nevada; it sells no
7 products in Nevada; it conducts no business in Nevada. Moreover, CW is neither domiciled in
8 nor organized under the laws of Nevada, and does not maintain its principal place of business in
9 Nevada. As Third-Party Plaintiffs concede, CW is a New York corporation.

10 The exercise of personal jurisdiction over CW may not be based upon contacts with
11 Nevada of another corporate entity with which CW may be affiliated, such as CW-NV and/or
12 CW-TX. *See Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335, 45 S. Ct. 250, 69
13 L.Ed. 634 (1925) (declining to attribute, for jurisdictional purposes, the presence of a subsidiary
14 in the forum state to a nonresident parent corporation where the parent and subsidiary maintained
15 distinct and separate corporate entities); *In re Western States Wholesale Natural Gas Litigation*,
16 605 F. Supp. 2d 1118, 1132-34 (D. Nev. 2009) (parent corporation and its subsidiary did not lack
17 corporate separateness required for subsidiary’s forum contacts to be attributed to parent under
18 alter ego theory for purposes of establishing personal jurisdiction over parent in antitrust action,
19 even though parent provided financing to subsidiary and they shared office space and staff, given
20 that parent maintained corporate formalities and properly documented loans and capital
21 contributions made to subsidiary, that parent had in place specific policies regarding when it
22 would act as subsidiary’s guarantor, demonstrating that they were viewed as separate entities
23 generally not liable for each other’s obligations, that parent’s oversight of subsidiary was
24 consistent with its investor status, and that parent had little to no role in subsidiary’s daily
25 operations); *see, e.g., Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir.
26 1977).

27 Accordingly, Third-Party Defendant CW moves this Court to dismiss all claims asserted
28 against CW for lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil

1 Procedure applicable to bankruptcy cases under Rule 7012 of the Federal Rules of Bankruptcy
2 Procedure.

3 **3. FAILURE TO STATE A CLAIM AGAINST THE CUSHMAN ENTITIES.**

4 The negligence-based allegations in the Third-Party Complaint against the Cushman
5 Entities must be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure
6 since such claims were filed outside the applicable statute of limitations. In addition, the
7 equitable indemnity claims in the Third-Party Complaint against the Cushman Entities must be
8 dismissed pursuant to Rule 12(b)(6) since such claims fail as a matter of law.

9 **A. Rule 12(b)(6) Standard.**

10 The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of
11 the complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal under Rule
12 12(b)(6) is proper when a complaint exhibits either a “lack of a cognizable legal theory or the
13 absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*
14 *Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). The court must accept as true all material allegations in
15 the complaint as well as all reasonable inferences that may be drawn from such allegations. *See*
16 *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 (9th Cir. 2000). The court also must construe the
17 allegations of the complaint in the light most favorable to the nonmoving party. *See Shwarz v.*
18 *United States*, 234 F.3d 428, 435 (9th Cir. 2000).¹ The court is not, however, required to accept
19 as true conclusory allegations, unwarranted factual deductions, or unreasonable inferences. *See*
20 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Bare assertions, which are
21 no more than a “formulaic recitation” of the elements of a claim, are not entitled to an
22 assumption of truth. *See Moss v. U.S. Secret Svs.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal
23 citation omitted). Similarly, “[a] pleading that offers ‘labels and conclusions’ ... will not do.”
24 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
25 555 (2007)).

26 ...

27 ¹ The Cushman Entities deny any liability to Third-Party Plaintiffs and deny all material allegations asserted against
28 them.

“Dismissal on statute of limitations grounds can be granted pursuant to FED. R. CIV. P. 12(b)(6) ‘only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.’ ” *Two Rivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999) (quoting *Vaughn v. Grijalva*, 927 F.2d 476, 478 (9th Cir. 1991)).

B. Applicable Statute of Limitations Bars the Negligence-Based Claims.

The Third-Party Complaint describes the relevant time period as “starting in mid-2005” and “continuing through the closing of the loan transaction on November 21, 2005” and “continuing until mid-2008.” (See Third-Party Complaint, Doc. 178, at p. 12, ¶ 38.) The Third-Party Complaint also relies on the “appraisal” as the sole basis for the Third-Party Plaintiff’s allegations against the Cushman Entities, based on limited allegations as follows:

- To determine and justify the loan amounts, Credit Suisse allegedly hired the firm Cushman & Wakefield to perform a Project appraisal. Based on a “total net value” methodology suggested by Credit Suisse, Cushman & Wakefield appraised the Project’s total net value at approximately \$1.6 billion. (*Id.* at p. 13, ¶ 43);
- Cushman & Wakefield’s “appraisals” were allegedly not appraisals at all, but undiscounted financial projections. (*Id.* at p. 11, ¶ 33);
- Third-Party Plaintiffs allege that they are now informed and believe that the “Total Net Value” appraisal Cushman & Wakefield performed was allegedly based on a methodology that was not a market value appraisal as required under applicable federal and state law, namely ... FIRREA ... USPAP ... and banking and industry standards. (*Id.* at p. 14, ¶ 44).

However, Third-Party Plaintiffs admit that the appraisal made the basis of Third-Party Plaintiffs’ allegations was completed by no later than November 21, 2005 – that is, the date of the loan agreement. (*Id.* at p. 14, ¶ 45.) Moreover, Third-Party Plaintiffs allege that, as of November 21, 2005, the appraisal “did not provide a present value discount” and that the Lenders would “perform for themselves whatever quantification and analysis they believed necessary to assess the risks and value of the loan, including determining the appropriate discount rate to apply to the Cushman & Wakefield projected cash flows.” (*Id.* at p. 13, ¶ 43.) Thus, for purposes of this Motion to Dismiss and the Court’s standard of review under Rule 12(b)(6), the Third-Party Complaint effectively admits that Third-Party Plaintiffs either knew or should have known in 2005 of alleged facts that the appraisal was “not a market value appraisal.”

Under any applicable Nevada statute of limitations (two-years, three-years or four-years), Third-Party Plaintiffs had to commence their negligence-based claim against the Cushman Entities long before January 25, 2013. *See Brant v. Shea Mortg., Inc.*, No. 2:10-cv-771 JCM (RJJ), 2010 WL 3154565 at *2 (D. Nev. Aug. 6, 2010) (applying two-year statute of limitations under N.R.S. § 11.190(4)(e) for similar negligence-based claims); *see Lund v. Harborview Mortg. Loan Trust Mortg. Loan*, No. 2:11-cv-00384-RLH-RJJ, 2011 WL 4344003 at *2 (D. Nev. Sept. 14, 2011) (applying three-year statute of limitations under N.R.S. § 11.190(3)(d) to negligence-based claims); *see Hannenman v. Downer*, 110 Nev. 167, 181 n. 8 (Nev. 1994) (applying four-year statute of limitations under N.R.S. § 11.220 to negligence-based claim).

The statute of limitation necessarily ran by the time Third-Party Plaintiffs filed their negligence-based claims against the Cushman Entities on January 23, 2013. Accordingly, Third-Party Defendants CW-NV, CW, and CW-TX move this Court to dismiss all negligence-based claims against the Cushman Entities for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure applicable to bankruptcy cases by Rule 7012 of the Federal Rules of Bankruptcy Procedure.

C. The Equitable Indemnity Claims Against the Cushman Entities Fail as a Matter of Law.

Third-Party Plaintiffs contend that “based upon the active and primary wrongful conduct of the Third-Party Defendants ... Third-Party Plaintiffs are entitled to complete and total indemnification by the Third-Party Defendants from any liability of any kind that may be imposed upon Third-Party Plaintiffs.” (Third-Party Complaint, at p. 21, ¶ 85.).

“The remedies of contribution and implied, i.e., noncontractual indemnity allow parties extinguishing tort liabilities by way of settlement or payment of judgments to seek recovery from other potential tortfeasors under equitable principles.” *The Doctors Co. v. Vincent*, 120 Nev. 644, 651, 98 P.3d 681, 686 (Nev.2004). “In order for one tortfeasor to be in a position of secondary responsibility vis-a-vis another tortfeasor, and thus be entitled to indemnification, there must be a preexisting legal relation between them, or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor.” *Black & Decker (U.S.), Inc. v. Essex Group, Inc.*, 775 P.2d

698, 700 (Nev. 1989); *see Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 801 (Nev. 2009) (finding that “implied indemnity is an equitable remedy ... to address the unfairness which results when one party, who has committed no independent wrong, is held liable for the loss of a plaintiff caused by another party”).

Third-Party Plaintiffs have no legal or factual basis for claiming equitable indemnity from the Cushman Entities. No duty exists on the part of the Cushman Entities to Third-Party Plaintiffs. In addition, Third-Party Plaintiffs’ claims against the Cushman Entities are pled in the alternative and are necessarily predicated upon the existence of their own liability which operates as a bar to their equitable indemnity claim against the Cushman Entities because Third-Party Plaintiffs will have been found to have committed an “independent wrong.”

Accordingly, Third-Party Defendants CW-NV, CW, and CW-TX move this Court to dismiss all equitable indemnity claims against the Cushman Entities for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure applicable to bankruptcy cases by Rule 7012 of the Federal Rules of Bankruptcy Procedure.

4. MORE DEFINITE STATEMENT OF THIRD-PARTY COMPLAINT.

Pleading in the alternative, to the extent necessary, the Third-Party Complaint fails to sufficiently plead causes of action against each of the Cushman Entities such that the Cushman Entities are currently unable to reasonably prepare a response without resulting in prejudice.

A. Rule 12(e) Standard.

Rule 12(e) of the Federal Rules of Civil Procedure provides that a party may file a motion for a more definite statement if a pleading “is so vague or ambiguous that the party cannot reasonably prepare a response.” A court properly grants a motion for more definite statement where the complaint is so vague or ambiguous that the opposing party cannot respond, even with a simple denial, in good faith or without prejudice to himself. *See Comm. for Immigrant Rights of Sonoma Cty. v. Cty. of Sonoma*, 644 F. Supp. 2d 1177, 1191 (N.D. Cal. 2009). Whether to grant a Rule 12(e) motion is a matter committed largely to the discretion of the district court. *See McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir.1996).

...

B. The Vague and Ambiguous Third-Party Complaint.

Here, the only causes of action alleged against the Cushman Entities are: (1) negligence based claims, (2) equitable indemnity, and (3) contribution. However, the Third-Party Complaint does not explicitly set forth any alleged facts to support each of the causes of action asserted against each of the Cushman Entities. Instead, Third-Party Plaintiffs rely upon a general recitation of the basic elements of these causes of action blended with vague allegations “lumped” together against all Third-Party Defendants in conclusory fashion.

The Third-Party Complaint refers to appraisals of “Cushman & Wakefield” (defined by Third-Party Plaintiffs as CW, CW-TX, and CW-NV, collectively), prepared at the request of Third-Party Defendant Credit Suisse, that were purportedly not compliant with traditional banking standards, USPAP, and/or FIRREA. (*See* Third-Party Complaint, Doc. 178, at pp. 13-14, ¶¶ 43-44.) The Third Party Complaint also refers to an alleged “special relationship” between Third Party Plaintiffs and the Cushman Entities (*id.* at pp. 12-13, ¶ 38) and alleged “misrepresentations” and/or “oral misstatements” made by the Cushman Entities to Third-Party Plaintiffs (*id.* at p. 14, ¶ 45 & p. 17, ¶¶ 60-61). It is unclear, however, as to what specific allegations are made against which Cushman Entity that purportedly created a “special relationship”. Similarly, it is unclear as to what specific “misrepresentations” and/or “oral misstatements” were allegedly made by which Cushman Entity to each Third-Party Plaintiff.

Also, “the right of contribution exists only in favor of a tortfeasor who has paid more than his or her equitable share of the common liability, and the tortfeasor’s total recovery is limited to the amount paid by the tortfeasor in excess of his or her equitable share.” NEV. REV. STAT. § 17.225(2); *see The Doctors Co.*, 98 P.3d at 686. If there is no judgment for injury against the tortfeasor seeking contribution, the tortfeasor’s right of contribution is barred unless the tortfeasor has: (a) discharged by payment the common liability within the statute of limitations period applicable to claimant’s right of action against him or her and has commenced an action for contribution within 1 year after payment; or (b) agreed while action is pending against him or her to discharge the common liability and has within 1 year after the agreement paid the liability and commenced an action for contribution. NEV. REV. STAT. § 17.285(4)(a)-(b).

Equitable indemnity is a theory similar to contribution under which a passive tortfeasor can recover from an active tortfeasor any measure of damages for which the former has been made liable to the plaintiff based on the latter's tortious acts. *See, e.g., Black & Decker (U.S.)*, 775 P.2d at 699. The "remedy is available after the defendant has extinguished its own liability through settlement or by paying a judgment." *Rodriguez*, 216 P.3d at 801. "A claimant seeking equitable indemnity must plead and prove that: (1) it has discharged a legal obligation owed to a third party; (2) the party from whom it seeks liability also was liable to the third party; and (3) as between the claimant and the party from whom it seeks indemnity, the obligation ought to be discharged by the latter." *Id.* The Nevada Supreme Court "adopted the warning found in *Pender v. Skillcraft Industries, Inc.*, 358 So.2d 45, 47 (Fla. Dist. Ct. App. 1978), that implied indemnification should not be construed as permission to open a floodgate for cross-claims seeking indemnification where there is no connection between the cross-claimant [or third-party plaintiff] and the party from whom indemnification is sought." *Id.* (internal quotations omitted); *see also Scaffidi v. United Nissan*, 425 F. Supp. 2d 1159, 1172 (D. Nev. 2005) (holding that Nevada law requires " 'a preexisting legal relation ... or some duty on the part of the primary tortfeasor to protect the secondary tortfeasor' " for equitable indemnity to apply) (quoting *Black & Decker (U.S.)*, 775 P.2d at 700).

In this case, the Third-Party Complaint alleges in conclusory fashion that any liability against Third-Party Plaintiffs "is based upon the active [and primary] wrongful conduct of the Third-Party Defendants" and that Third-Party Plaintiffs "are entitled to complete and total indemnification [and contribution] by the Third-Party Defendants from any liability of any kind that may be imposed upon Third-Party Plaintiffs." (Third-Party Complaint, Doc. 178, at p. 21, ¶ 85 & p. 22, ¶ 89.) The Third Party Complaint, however, fails to plead sufficient facts indicating any duty of care owed by any Cushman Entity to any Third-Party Plaintiff and/or any nexus or special relationship between any Cushman Entity and any Third-Party Plaintiff. *See Black & Decker (U.S.)*, 775 P.2d at 699-700; *Rodriguez*, 216 P.3d at 802.

Accordingly, and in the alternative, Third-Party Defendants CW-NV, CW, and CW-TX move this Court to direct Third-Party Plaintiffs to adequately and properly plead the allegations

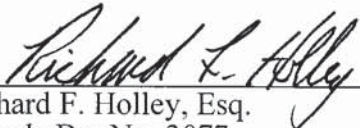
1 necessary against each of the Cushman Entities to allow each to frame a response without
2 potentially subjecting themselves to prejudice.

3 **CONCLUSION**

4 For the foregoing reasons, CUSHMAN & WAKEFIELD, INC., CUSHMAN &
5 WAKEFIELD OF TEXAS, INC., and CUSHMAN & WAKEFIELD OF NEVADA, INC.,
6 respectfully request that this Court dismiss the Third-Party Complaint, in whole or in part,
7 against the Cushman Entities as requested under Rule 12(b)(1), 12(b)(2), and/or 12(b)(6) of the
8 Federal Rules of Civil Procedure and/or, in the alternative, direct Third-Party Plaintiffs to
9 sufficiently plead the causes of action against each of the Cushman Entities under Rule 12(e) of
10 the Federal Rules of Civil Procedure, and also request such other and further relief to which they
11 may be entitled under the circumstances.

12 DATED this 8th day of April, 2013.

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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re
 THE RHODES COMPANIES, LLC, aka
 "Rhodes Homes," et al.,
 Reorganized Debtors.

Case No. 09-14814-LBR
 Chapter 11

THE LITIGATION TRUST OF THE RHODES
 COMPANIES, LLC, et al.,
 Plaintiff,

Adv. No. 12-01099-LBR

**MOTION TO WITHDRAW REFERENCE
 AND MEMORANDUM OF LAW**

v.
 JAMES M. RHODES; ET AL.,
 Defendants.

**RELIEF IS SOUGHT FROM A UNITED
 STATES DISTRICT JUDGE**

JAMES M. RHODES, SAGEBRUSH
 ENTERPRISES, INC., JOHN C. RHODES,
 TRUSTEE OF THE JAMES M. RHODES
 DYNASTY TRUST I, JOHN C. RHODES,
 TRUSTEE OF THE JAMES M. RHODES
 DYNASTY TRUST II, and RHODES RANCH,
 LLC,

Third-Party Plaintiffs,

1 v.

2 CREDIT SUISSE AG, a Swiss corporation; ET
3 AL.,

4 Third-Party Defendants.

5 **MOTION TO WITHDRAW REFERENCE AND MEMORANDUM OF LAW**

6 **RELIEF IS SOUGHT FROM A UNITED STATES DISTRICT JUDGE**

7 Third-Party Defendants CUSHMAN & WAKEFIELD OF TEXAS, INC. (“CW-TX”)
8 and CUSHMAN & WAKEFIELD OF NEVADA, INC. (“CW-NV”), by and through their
9 counsel, Beirne, Maynard & Parsons, L.L.P. and Cotton, Driggs, Walch, Holley, Woloson &
10 Thompson, hereby file their Motion to Withdraw Reference Under Local Rule 5011 and
11 Memorandum of Law in support thereof (the “Motion to Withdraw Reference”). Also, as
12 required by Local Rule 5011(a), RELIEF IS SOUGHT FROM A UNITED STATES DISTRICT
13 JUDGE by and through the Motion to Withdraw Reference.

14 **RESERVATION AND PRELIMINARY STATEMENT**

15 This Motion to Withdraw Reference is made subject to and without waiving CW-TX’s
16 and CW-NV’s Motion to Dismiss the Third-Party Complaint. CW-TX and CW-NV separately
17 seek dismissal of the Third-Party Complaint on several grounds including, *inter alia*, lack of
18 subject matter jurisdiction and failure to state a claim against CW-TX and CW-NV.

19 **RELEVANT PROCEDURAL FACTS**

20 1. On either March 31, 2009 and April 1, 2009 (collectively, the “Filing Date”), each
21 of the above-captioned debtors (collectively, the “Debtors”) filed voluntary petitions under
22 Chapter 11 of Title 11 of the United States Code (the “Bankruptcy Code”).

23 2. On February 18, 2010, the First Lien Steering Committee filed their Third
24 Amended Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code for The
25 Rhodes Companies, LLC, et. al. (the “Third Amended Plan”). (See Third Amended Plan [Doc.
26 1013, Case No. 09-14814-LBR] dated February 18, 2010.) The Third Amended Plan established
27 the Litigation Trust of The Rhodes Companies, LLC et al. (the “Litigation Trust”) to “enforce all
28 rights to commence and pursue, as appropriate, any and all Causes of Action, whether arising

1 before or after the Petition Date.” (See Third Amended Plan [Doc. 1013, Case No. 09-14814-
2 LBR] at p. 36 of 72, Article IV.P.)

3 3. On March 19, 2010, the Bankruptcy Court entered an Order Confirming the Third
4 Amended Plan (the “Confirmation Order”). (See Confirmation Order [Doc. 1060, Case No. 09-
5 14814-LBR] dated March 19, 2010.) The Confirmation Order states that the Third Amended
6 Plan was substantially consummated on the “Effective Date.” (*Id.* at p. 18 of 120, ¶ 31.)

7 4. On May 11, 2012, the Litigation Trust commenced the above-captioned adversary
8 proceeding by filing its Original Complaint (the “Original Complaint”) against the above-
9 captioned defendants. (See Original Complaint [Doc. 1, Case No. 12-01099-LBR] dated May 11,
10 2012.) The Original Complaint asserts various causes of action against the Third-Party Plaintiffs
11 and others: (1) breach of fiduciary duty, (2) aiding and abetting breaches of fiduciary duty, (3)
12 alter ego / piercing the corporate veil, (4) unjust enrichment, (5) avoidance of constructively
13 fraudulent transfers under 11 U.S.C. § 544(b) and NRS §§ 112.180(1)(b) and 112.190, (6)
14 avoidance of transfers made with the actual intent to hinder, delay, or defraud under 11 U.S.C. §
15 544(b) and NRS §§ 112.180(1)(a), (7) avoidance of constructively fraudulent transfers under 11
16 U.S.C. § 548(a)(1)(B), (8) avoidance of transfers made with the actual intent to hinder, delay, or
17 defraud under 11 U.S.C. § 548(a)(1)(A), (9) recovery of avoidable transfers under 11 U.S.C. §
18 550, (10) declaratory judgment regarding Rhodes Ranch GP’s 99% membership interest in
19 Gypsum Resources pursuant to NRS §§ 30.030 and 30.040, (11) turnover of a 99% membership
20 interest in Gypsum Resources under 11 U.S.C. § 542, and (12) avoidance of any transfers of
21 Rhodes Ranch GP’s 99% membership interest in Gypsum Resources as a transfer made with
22 actual intent to hinder, delay, or defraud creditors of Rhodes Ranch GP under 11 U.S.C. § 544(b)
23 and NRS §§ 112.180. (*Id.* at pp. 41-61.)

24 5. On June 29, 2012, Defendants filed their Motion for Withdrawal of Reference
25 seeking relief from the United States District Court. (Defendants’ Motion for Withdrawal of
26 Reference [Doc. 66, Case No. 12-01099-LBR] dated June 29, 2012 or [Doc. 1, Case No. 12-
27 01272-MMD-VCF] dated July 17, 2012.) On November 7, 2012, the United States District Court
28 denied the withdrawal of reference and held that the Bankruptcy Court may issue reports and

1 recommendations on all pre-trial matters in this case involving the fraudulent transfer claims;
2 however, the jury trial must be conducted by the District Court. (Order [Doc. 20, Case No. 12-
3 01272-MMD-VCF] dated November 7, 2012.)

4 6. On January 25, 2013, the above-captioned Third-Party Plaintiffs (collectively,
5 “Third-Party Plaintiffs”) filed their Third-Party Complaint and Demand for Jury Trial (the
6 “Third-Party Complaint”) against CW-TX, CW-NV and Cushman & Wakefield, Inc.
7 (collectively, the “Cushman Entities”), and numerous entities related to Credit Suisse AG
8 (collectively, the “Credit Suisse Entities”). (See Third-Party Complaint [Doc. 178, Case No. 12-
9 01099-LBR] dated January 25, 2013.)

10 7. The Third-Party Complaint asserts limited causes of action against the Cushman
11 Entities: negligence-based claims and equitable indemnity and contribution claims. All of these
12 causes of action are non-core, state law claims that do not arise from or relate to the Debtors’
13 Chapter 11 case. The Cushman Entities also have filed their Motion to Dismiss the Third-Party
14 Complaint (“Motion to Dismiss”) contemporaneously herewith.

15 8. Local Rule 5011(a) requires a motion to withdraw the reference in an adversary
16 proceeding to be “served and filed on or before the date on which an answer, reply, or motion
17 under Fed. R. Bankr. P. 7012 or 7015 is first due.” By filing this Motion to Withdraw Reference,
18 CW-TX and CW-NV do not consent to jurisdiction and explicitly reserve any challenges to
19 jurisdiction as set forth in the Motion to Dismiss that has been filed in these proceedings. This
20 Motion to Withdraw Reference is subject to the jurisdictional arguments raised in the Motion to
21 Dismiss and should not be construed as a general submission to the jurisdiction of the
22 Bankruptcy Court. CW-TX and CW-NV also submit, contemporaneously herewith and subject
23 to their jurisdictional challenges, their Demand for Jury Trial demanding a jury trial on all issues
24 on which they are entitled under the Seventh Amendment to the U.S. Constitution.

25 9. CW-TX and CW-NV do not expressly consent to the entry of any final orders or
26 judgments by the Bankruptcy Court concerning the non-core, state law claims alleged in the
27 Third-Party Complaint.

28 . . .

MOTION TO WITHDRAW REFERENCE

In light of the Third-Party Complaint, the District Court should now withdraw the reference of this adversary proceeding. On June 29, 2012, Defendants filed their Motion for Withdrawal of Reference seeking relief from the United States District Court. (Defendants' Motion for Withdrawal of Reference [Doc. 66, Case No. 12-01099-LBR] dated June 29, 2012 or [Doc. 1, Case No. 12-01272-MMD-VCF] dated July 17, 2012.). After briefing, on November 7, 2012, the District Court denied the withdrawal of reference and held that the Bankruptcy Court may issue reports and recommendations on all pre-trial matters involving the fraudulent transfer claims; however, the jury trial must be conducted by the District Court. (Order [Doc. 20, Case No. 12-01272-MMD-VCF] dated November 7, 2012.)

The facts and arguments raised in this current Motion to Withdraw Reference, as filed by CW-TX and CW-NV, are distinguishable from Defendants' Motion for Withdrawal of Reference and justify the withdrawal of reference at this time. In their Third-Party Complaint, the Third-Party Plaintiffs have raised non-core, state law claims that do not arise in or relate to the Debtors' bankruptcy case. The Third-Party Plaintiffs, on the other hand, were seeking to withdraw reference on the claims that were clearly core, such as fraudulent transfer claims. (See Defendants' Motion for Withdrawal of Reference [Doc. 66, Case No. 12-01099-LBR] dated June 29, 2012 or [Doc. 1, Case No. 12-01272-MMD-VCF] dated July 17, 2012.)¹ Now, the proceedings have become much more complex by involving third-party, non-core, state law claims between non-debtor entities that have no close nexus to the bankruptcy case. This is entirely different than claims raised by the Litigation Trust for recovery of fraudulent transfers and other claims against parties affiliated with the Debtors.

Accordingly, CW-TX and CW-NV request the withdraw of reference because it would be a more efficient use of judicial resources to have the District Court hear all matters in connection with the Third-Party Complaint, such as the non-core, state law claims involving private rights to the extent the Cushman Entities' Motion to Dismiss is not granted in its entirety.

¹ Notably, Third-Party Plaintiffs tried to distinguish this fact at that time by arguing that those claims were not core, but were just pled that way to avoid the withdrawal of reference.

LEGAL STANDARDS FOR WITHDRAWAL OF REFERENCE

The Order denying Defendants' Motion for Withdrawal of Reference (Doc. 20, Case No. 12-01272-MMD-VCF) has an extensive analysis of the legal standard for withdrawal of reference and does not need to be repeated here. Importantly, however, the District Court retains discretion to withdraw the reference, in whole or in part, for cause shown, such as the efficient use of judicial resources, delay and costs to the parties, uniformity of bankruptcy administration, prevention of forum shopping and other factors. *See Security Farms v. Int'l Broth. of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1008 (9th Cir. 1997). Other relevant factors include whether the case is core, or non-core, and whether a jury trial has been requested. While a Bankruptcy Court may hear a non-core proceeding, it may not enter final judgment on such matters absent consent of all parties and the Bankruptcy Court shall submit proposed findings of fact and conclusion of law to the district court, which shall enter appropriate findings of fact and conclusions of law after de novo review.

A bankruptcy court cannot enter a final judgment on a cause of action traditionally within the judicial power of an Article III Court and does not have the constitutional authority to do so with respect to private (not public) rights. *See Stern v. Marshall*, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). While not specifically applicable here, the Ninth Circuit considered *Stern* as it related to a Bankruptcy Court's authority to enter a final order in a fraudulent transfer action, and held that, in that case, consent to the entry of such final judgment by the Bankruptcy Court may be implied from the conduct in the litigation, such as where the defendant filed a proof of claim. *See In re Bellingham Insurance Agency, Inc.*, 702 F.3d 553 (9th Cir. 2012). The Ninth Circuit upheld the expansive view of *Stern* that a bankruptcy court cannot adjudicate cases involving private rights. Additionally, in evaluating whether or not to withdraw the reference, the court should consider whether, under *Stern*, the bankruptcy court is constitutionally empowered to adjudicate the causes of action alleged in the underlying complaint.

...

...

...

ARGUMENT

1. CAUSE EXISTS TO WITHDRAW THE REFERENCE.

The Third-Party Complaint raises only non-core, state law claims, none of which arise from or are related to the bankruptcy proceeding. An analysis of the factors that support withdrawing the reference follows:

A. Non-Core, State Law Claims of the Third-Party Complaint.

The primary factor in deciding a motion to withdraw the reference is whether the bankruptcy court has authority to finally determine claims underlying such motion. *See Dev. Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 462 B.R. 457, 469 (S.D.N.Y. 2011). Historically, this was determined by examining the core versus non-core distinction of the claims and whether there was a timely demand for a jury trial. *Id.* Judicial efficiency is promoted by withdrawing the reference for those matters that are non-core since non-core claims are subject to de novo review. *In re Castlerock Properties*, 781 F.2d 159, 162 (9th Cir. 1986). “Efficiency is enhanced by withdrawing the reference when non-core issues predominate.” *Security Farms*, 124 F.3d at 1008. “Inasmuch as a bankruptcy court’s determination on non-core matters are subject to de novo review by the district court, unnecessary costs could be avoided by a single proceeding in the district court.” *Castlerock*, 781 F.2d at 162. The Ninth Circuit has held that it was an abuse of discretion not to withdraw the reference when there is a non-core matter and a timely jury demand. *In re Cinematronics, Inc.*, 916 F.2d 1444, 1451 (9th Cir. 1990).

After *Stern v. Marshall*, the following additional analysis is required to determine the advantages and disadvantages of leaving the underlying complaint before the Article I court or moving it to an Article III court: (1) whether the rights being adjudicated are public rights or (2) whether the rights being adjudicated will necessarily be resolved in ruling on a creditor’s proof of claim, or (3) whether the parties unanimously consent to the bankruptcy court adjudicating their claims. *Dev. Specialists*, 462 B.R. at 467.

Here, case efficiency is enhanced by withdrawing the reference because the Third-Party Complaint raises only non-core, state law claims, none of which arise from or are related to the bankruptcy proceeding and/or any proof of claim. And, these state law claims have little, if any,

1 commonality with the fraud-based claims made in the Original Complaint against Third-Party
2 Plaintiffs. Moreover, CW-TX and CW-NV do not consent to the entry of any appropriate orders
3 or judgments by the Bankruptcy Court, and have timely requested a jury trial to the District
4 Court.

5 Additionally, the Cushman Entities' Motion to Dismiss, incorporated herein for all
6 purposes, shows that the Third-Party Complaint should be dismissed for several other reasons,
7 including, without limitation to, lack of subject matter jurisdiction. The Bankruptcy Court lacks
8 subject matter jurisdiction, and there are no other grounds for jurisdiction in the District Court,
9 i.e., no federal question, no diversity, and no related to or arising under a bankruptcy case
10 jurisdiction. For that reason, once the reference is withdrawn, the District Court should dismiss
11 the Third-Party Complaint on the grounds set forth in the Motion to Dismiss.

12 **B. Delay and Cost to the Parties.**

13 CW-TX and CW-NV do not concede that the Bankruptcy Court has any jurisdiction to
14 consider any matters alleged in the Third-Party Complaint. Nonetheless, if the Bankruptcy Court
15 hears the non-core, state law claims of the Third-Party Complaint, it may only submit proposed
16 findings of fact and conclusions of law to the district court for *de novo* review. 28 U.S.C. § 157
17 (1994); *see Security Farms*, 124 F.3d at 1008. Not only would the parties be required to engage
18 in motion practice before two different courts, this would require both courts – the Bankruptcy
19 Court, then the District Court – to arguably consider the same issues, thereby implicating
20 unnecessary costs and delay. These unnecessary costs and delay could be avoided by a single
21 proceeding in the district court. *See Security Farms*, 124 F.3d at 1009.

22 **C. Uniformity of Bankruptcy Administration.**

23 The Third-Party Complaint raises only non-core, state law claims, none of which arise
24 from or are related to the bankruptcy proceeding. Thus, the consideration of these claims by the
25 Bankruptcy Court will not improve the uniformity of bankruptcy administrations. Indeed,
26 withdrawing the reference will not interfere with the bankruptcy case in which a plan was
27 confirmed years ago.

28 ...

1 **D. Prevention of Forum Shopping.**

2 Reducing forum shopping is one factor to be considered in determining whether to grant
3 a motion to withdraw reference. *See Security Farms*, 124 F.3d at 1008. CW-TX and CW-NV are
4 not forum shopping; instead, CW-TX and CW-NV contend that judicial efficiency weighs in
5 favor of one court – the District Court – to address the non-core, state law claims of the Third-
6 Party Complaint from beginning to end, to the extent all claims for relief against the Cushman
7 Entities are not dismissed pursuant to their Motion to Dismiss. Moreover, confusion of unrelated
8 issues between the bankruptcy proceeding, the Original Complaint, and the Third-Party
9 Complaint would likely be avoided should the District Court handle all matters concerning the
10 non-core, state law claims of the Third-Party Complaint.

11 **E. Jury Trial Demand.**

12 CW-TX and CW-NV have a constitutional right to a jury trial. *See* U.S. Const. amend.
13 VII; *Cinematronics*, 916 F.2d at 1451. Here, the Third-Party Complaint alleges non-core, state
14 law claims against CW-TX and CW-NV; consequently, CW-TX and CW-NV have requested a
15 trial by jury. (*See* Demand for Jury Trial, filed contemporaneously herewith.) Accordingly, the
16 District Court should consider these state law claims which have little, if any, commonality with
17 the bankruptcy proceeding and/or the fraud-based claims made in the Original Complaint against
18 Third-Party Plaintiffs.

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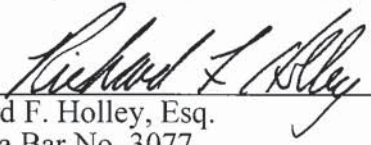
28 ...

CONCLUSION

For the reasons set forth herein, CW-TX and CW-NV respectfully request that the Court enter an order granting their Motion to Withdraw Reference, and grant such other and further relief as may be just and proper.

DATED this 8th day of April, 2013.

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